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THE NEW JURISPRUDENCE

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To

THE RT. HON. ERNEST, BARON RUTHERFORD,
O.M., F.R.S.

THIS BOOK IS DEDICATED

IN MEMORY OF A CERTAIN CONVERSATION AT
ST. ANTON AM ARLBERG, ON 22ND AUGUST, 1913

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TABLE SHOWING ARRANGEMENT OF A SYSTEM OF
NATIONAL LAW ACCORDING TO ITS SUBJECT-
MATTER

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Notes.—To avoid cumbering the text with technical references, these have been placed in an Appendix, to which numerical guides are given in the pages of the text. Non-professional readers may ignore these.

PREFACE

NOT more than the usual amount of apology is required for a new book on Jurisprudence. Since the appearance of Sir Frederick Pollock's admirable, but all too brief, *First Book of Jurisprudence* in 1896, there has been much troubling of the waters. One of the most hopeful results is an increased interest in the less technical side of Law by the cognate Faculties of Arts, Economics, History, and Philosophy ; whilst highly-placed officials, and public men generally, have come to find it convenient to know their way about legal systems, even if they have no desire for a knowledge of technical details. When one remembers the attitude towards ' outsiders ' maintained by the professional authorities so late as the end of the last century, one is also delighted to find the most eminent judicial persons of to-day publicly advocating the study of the elements of law as part of a humane education.

These facts alone go far to justify the present attempt. But, if the author may be permitted to refer to his personal experience, he would say, that the correspondence which he has received from the readers of a work of his, published four years ago, *The Book of English Law*, has revealed the fact that the book has not only interested laymen, but has also stimulated wholesome criticism of some

of the root doctrines of Jurisprudence itself—the science of the law administered in Courts of Justice. Naturally, as the last-named book dealt only with English Law, its readers base their criticisms mainly on the rules and assumptions of that law ; but some of them refer to conditions in other countries as suggestive of praise or blame of English Law. Consequently, the author of the present work, while chiefly using English illustrations, has not shrunk from alluding to features of those foreign systems which the shortening of world distances is more and more impressing upon the attention of English men and women.

It has for some time been the growing belief of the author, that, after a long period of specialization carried to an almost extreme degree, the Western World is slowly turning towards a more attractive, and not less necessary, process of synthesis. But if that (to him) welcome belief is to be justified, it will be necessary for the specialists to write and speak, not in the technical and often forbidding jargon of the schools and professions, but in language which can be understood by the intelligent layman. It may be said that this is impossible ; that scientific truths cannot be expressed in the plain vernacular. It may be impossible ; but it has been done more than once—for recent example in the lucid and enthralling pages of Dr. A. N. Whitehead's *Science and the Modern World*. Not every one can write like Dr. Whitehead ; but moderately intelligent authors can try to do so. And the author of this book, at any rate, is quite prepared to face the criticism of his professional brethren ; for he

has undergone the orthodox professional tests and not been found wanting. But he would ask his critics to believe that if, in the following pages, he has referred but slightly to matters which in earlier books on Jurisprudence loom large, and dwelt on others which appear there only at long intervals or not at all, this is not due to oversight or to want of care, but to conclusions, right or wrong, drawn from a long and varied experience, active and passive, of legal teaching under all sorts of conditions.

It might have been expected that, in a book which professes to take account of recent changes in judicial practice, considerable reference would have been made to Soviet procedure. The author has studied, with such care as time permits, the verbatim official Report of the recent Trial of the Engineers at Moscow in the hope of discovering novelties. But the somewhat surprising result has been to convince him that the peculiarities of Soviet Justice are not novelties at all. They appear to be merely revivals of certain features of medieval practice long since abandoned by progressive nations. A conspicuous example is the obsession of the old Romano-Canon Law, that the main object of every criminal prosecution, both in the preliminary and the trial stages, is to extract a confession from the accused person, and then, if possible, to use it to convict his fellow-accused. This obsession led to the use of the torture chamber and such doubtful processes as 'confrontation' and 'reconstruction of the crime', which are still too common in comparatively enlightened systems. The fundamental principle

of English criminal procedure, that no accused person can be compelled to answer questions calculated to prove his guilt, either in the preliminary or the trial stages of a prosecution, is, apparently, in Soviet Justice, replaced by the (to an Englishman) revolting inquisitorial practice described above. In the Trial of the Engineers there was but one even nominally independent witness (Dolgov) for the prosecution; and his evidence was not only stoutly contradicted by two of the accused, but was in itself suggestive of a bargain with the prosecution.

The author deems it a high privilege to be able to state that the opening chapter of the book has benefited by the criticism of his friend Professor Samuel Alexander, O.M., who is, however, in no way responsible for any of the views which it contains. The author is also indebted to Mr. Kenneth H. Bain, LL.B., Lecturer in Law in the University of Bristol, for the careful index.

9 OLD SQUARE, LINCOLN'S INN,
May, 1933.

CHAPTER I

THE SPHERE OF JURISPRUDENCE

JURISPRUDENCE is the science, or body of ordered knowledge, which deals with a particular species of Law.

Law may be defined, provisionally, as the force, or tendency, which makes for righteousness. Of the origin of this force, little, if anything, is known; it is one of the ultimate facts of the universe, with which every observer has to reckon. But of the ways in which it works, and the results which it produces, or which seem, at any rate, to be consequential on its working, much has been observed in many fields of study. These ways and consequences differ greatly among themselves, and are, therefore, wisely made the provinces of different bodies of students and practitioners. But there is sufficient fundamental likeness between them to make it convenient to attempt, by way of clearing the ground, to point out the lines which, while not entirely obscuring their essential unity, draw certain boundaries between them.

The ways in which Law works may be first conveniently divided into the physical and the psychical. In the former of these, Law is working upon material which, whether animate or inanimate, is without those

qualities which distinguish mankind from the other contents of the universe. That this is a somewhat arbitrary distinction, may be freely admitted. The old tradition, that the universe revolves about the central figure of Man, a unique and alien being to whom all else is subservient and accessory, has long been abandoned by serious thinkers. But the researches which have changed the old outlook have not destroyed the important distinction which it attempted to express. Man, though part of the universe, and linked to it by many qualities which are common to most of its elements, has yet a definite province of his own, which, at any rate to members of his own race, seems to be worthy of serious study.

Despite the now prevailing view which recognizes at least a derivative connection between mankind and the so-called 'brute creation', a genus which can claim, as its peculiar qualities, the faculties of speech (with all that speech implies), self-consciousness, the exercise of reasoning powers, deliberate social organization (including the establishment of elaborate institutions), religious belief, a highly developed technology, and above all, the power of abstract thought, is sufficiently marked off from all other genera to demand distinctive treatment. And this none the less that, even in other genera, there are suggestions of instinct and habit which may, in the process of evolution, have played their part in the development of these specially human faculties. In common speech, this distinction is expressed by the contrast between Man and Nature, which, though, doubtless, often carelessly and inaccur-

**Man and
Nature**

ately used, is necessary, if any general plan of the sciences is to be attempted.

We may at once disclaim for Jurisprudence any direct concern with the non-human contents of the universe. Whether the laws which govern these non-human contents are merely explanatory or also causal—whether, for example, the law of gravitation is merely a way of stating that in given conditions material bodies behave in a certain way, or that this behaviour is caused by the operation of a specific and general tendency—these ‘natural (or physical) laws’ are not the work of the jurist, nor is he, as a jurist, interested in them, except in so far as they may throw light upon his own problems. In these problems, he accepts the conclusions of physical science, and regards these conclusions as *data* upon which to found his own conclusions; he does not, as a jurist, claim to be otherwise concerned with them.

The distinction between the laws of physical science and the laws with which jurisprudence is concerned is further emphasized by the fact that, unlike the jurist, who has a good deal to do with the actual framing of the laws which he administers, the student of physical science, whether he deals with the animate or the inanimate, the organic or the inorganic, is an observer only, not a creator. It is true that, in a sense, a genius like Newton or Charles Darwin may be said to formulate the laws of physical science. But his attitude is purely objective; he offers no criticism of the merits or defects of the laws which he formulates, nor does he take any part in giving effect to them.

The utmost that the student of physical science, or the practitioner who builds on his researches, can do, is to state them correctly, or, at the most, so to blend his different laws that, by co-operating with or counteracting one another, they may produce the results desired. Thus, whilst the claim of a certain well-known school of jurists to treat the laws of physical science as 'laws improperly so called' or 'merely metaphorical' laws, was rightly resented by the exponents of such laws as an absurd and narrow-minded piece of egoism, it is reasonably clear, that the laws of physical science are but remotely connected with those laws which are the special province of the jurist.

We are on more doubtful ground when we remember that our provisional definition of Law describes it, not only as a force, or tendency, but as a force or tendency which makes for righteousness. Evidently, in order to justify this qualification, we must accept the view, that the universe not merely exists, but displays in its working a harmony or order which we can fairly reconcile with ethical ideals. Needless to say, these ideals must not be of a sectarian or partisan type, but such as an adequate survey of the universe as a whole would justify. The fortunate few who can claim such an experience are, it is believed, almost unanimous in their admiration of the marvels which it reveals, and of the efficiency with which they serve their apparent ends. It is not a narrow pragmatism to assert that there is, in the physical world, a force or tendency which makes for righteousness, because the universe 'works'. Enough is known of the terrific powers lying hid

in the world of physical Nature, to say nothing of the follies and passions of Man, to enable one to guess at the appalling evils which might follow a suspension of this force or tendency. Happily also, in the triumphs of the architect and the engineer, the chemist and the surgeon, the farmer and the craftsman, we have such vivid examples of the benefits to be derived from a patient study of the laws of physical science, that we can feel no reasonable hesitation in attributing to such laws an overwhelming tendency towards righteousness.

When we pass from the physical to the psychical world, we are at once conscious of a change in the methods of approach to a study of its laws. It is true that, for some time after the boundary is crossed, the resemblances are almost as striking as the differences. The modern theologian, for example, occasionally claims for his science that it rests, at least in part, upon observation and experience, which are the special methods of the student of physical science. But this claim, even if it is not due to an attempt to 'steal the thunder' of a body of students whom he is apt, unfortunately, to regard with unfavourable eyes, is a comparatively modern weapon in his armoury. His oldest weapons are inspiration and revelation, perfectly legitimate weapons for the theologian, but wholly unsuited to the armoury of the student of physical science. Moreover, the theologian has regretfully to admit—an admission which the student of physical science would repudiate with energy—that the laws which he (the theologian) formulates, can be, and, alas, often are, broken, as the result of the opposition

The theologian's laws

or weakness of an element which plays no part in physical science, the human will. To meet the difficulty, the theologian has to predicate a system of rewards and punishments, a concept which has no counterpart in the physical world, but which, in one form or another, is to be found everywhere in the realm of psychical law. In the modern world, it is true, the 'sanctions' (to use a comprehensive word) invoked by the theologian are, for the most part, of a spiritual character only: 'The soul that sinneth, it shall die;' 'He that believeth on Me hath everlasting life.' And thus it is open to the materialist to doubt their existence. But in the history of organized religions, the concept of the sanction has in the past, as is well known, been expressed in a material form, in spite of the fact that theology claims to rule, not merely the conduct, but the beliefs of humanity. Happily, the folly of attempting to influence belief by the application of material sanctions has become apparent with the progress of enlightenment; and the Churches of those religious systems which have realized this fact have gained unspeakably by its recognition. Especially may the religions which profess to derive their authority from the One true God be content to leave to Him the enforcement of His own laws.

We find, then, that the 'notes' which distinguish the laws of the theologian from those of the exponent of physical science are (i) their reliance upon inspiration and revelation instead of observation and experiment, (ii) their derivation of authority from a Supreme Unseen Being, (iii) their claim to regulate human belief and conduct, (iv) their pro-

clamation of spiritual sanctions. Their ethical ideal may not unfairly be described as the salvation of souls. The various types of organization to which these laws give rise, and the institutions through which they are expressed, are irrelevant for our purpose.

Proceeding, by the method of exclusion, to the type of laws, next in the order of historical evolution in the psychical sciences to the theological, we come to a group which the older writers called the 'moral', but for which modern use tends to substitute the name 'social,' sciences. As the latter name implies, they are concerned, mainly if not exclusively, with Man as a member of a human group. It appears to be not improbable, that they were formed, at an early date in the history of ideas, by a process of separation from the religious or theological kind. On the one hand, they approach the boundary which separates the physical from the psychical world, in that they are concerned largely with material ideals, for example in economics, hygiene, material well-being generally. On the other, they are intimately concerned with the regulation of human conduct; in this resembling theological laws, though, by their very nature, they are far less concerned with Man as an individual than with Man as a member of a community of his fellow-men. It may be regarded as a moot point whether a solitary individual, marooned on a desert island, would really believe himself to be bound by moral laws; though, if he were an adult at the time of his arrival, he would probably continue to follow, as opportunity

occurred, at least to a limited extent, his traditional code of morality.

Also, as might be expected from their history, the moral or social sciences have been, and are, to a considerable extent, influenced by the laws of the parent science from which they have hived off ; a conspicuous example being the laws against usury, which were a religious product. Nevertheless, for the most part, their exponents claim no super-human authority for their doctrines ; and, though it is no accident that the laws of morality, to a large extent, resemble the laws of religion and the laws of the jurist, their sanctions, and the modes in which these are enforced, are, as we shall see, essentially different from either.

It is hardly necessary to point out, that the groups within which the laws of morality operate vary infinitely in kind, and may be formed on many different bases. The Varieties of social groups tribe or clan and the household, probably also the ancient gild, were formed on a basis of kinship, real or fictitious ; the village, the market (whether in its primitive or highly developed forms), and the Trade Union clearly rest on economic bases ; the university, the college, and the learned society generally are formed for the mutual pursuit of culture ; the ordinary ' club ' to promote the amenities of leisure, and so on. It is, in fact, this definite basis which distinguishes a society from a mere chance crowd, and gives it stability and permanence. In a sense, a society primarily formed for a religious purpose, a Church, often has a purely social or moral, as distinct from a religious basis, and may develop a morality

which is quite independent of its primary purpose. It can, for example, hardly have any religious significance whether the male members of a Church attend public worship in tall hats or less formal headgear, or whether light refreshments should or should not be provided at missionary meetings. Yet the etiquette practised by the society on such occasions may be very strict ; and the rules observed may quite fairly be described as social or moral laws.

The ethical ideal which, as we have said, is demanded by the concept of Law may, in the case of social or moral laws, be said to be the furtherance of the common end of the group to which they apply. Naturally, this varies in detail with the object with which the group is formed. The object of the Trade Union is, for example, the maintenance and, if possible, the raising, of the standard of life of its members, especially in the matter of wages and hours ; and its laws or rules will, successfully or unsuccessfully, be directed to that form of rightness or righteousness. The ordinary sports club being formed for the pursuit of common games or relaxations, its rules or laws will be aimed at preventing the unsocial or anti-social conduct of individual members conflicting with this end, or, conversely, of encouraging social feeling. Being, as are all social laws, formulated by human agency, they may be unwise or inefficient. For precisely the same reason, they can, unlike physical laws and, *ex hypothesi*, religious laws, be altered and improved. The standard aimed at will, obviously, vary from case to case ; but, if a simple word is to be chosen to express the

general ideal of social or moral laws, it is, probably, to such laws that the famous formula of Jeremy Bentham—utility—most fitly applies. Bentham, profoundly influenced by the insurgence of public opinion in Europe which led to the French Revolution, with its extreme insistence on individual liberty, seems to have regarded the nation, or the political society, as the only possible, or, at least, the most important kind of society ; and he shows little understanding of the innumerable groups which, wielding the powerful sanction of exclusion from their ranks, greatly influence the life of the ordinary citizen. Consequently, he was too apt to regard the nation and the individual as the only entities to be considered. But the interpretation which he put on the ideal of utility—the surplus of pleasure over pain—though it has of late years provoked a sharp reaction against his influence as a jurist, may be found less unsuitable as an ideal for the moralist than for the jurist.

We come at last to the laws which are the subject matter of jurisprudence ; and it will not be long before the marks which distinguish them, not merely from the laws of physical science, but from those of the theologian and the moralist, begin to appear.

For example, the laws of the jurist, though these, like the laws of the moralist, imply the existence of a society, apply only to societies of a very special and important kind—the political society or nation, which is itself distinguished by certain striking characteristics from all other societies, religious, economic, cultural, and the like.

The jurist's laws

The national group

In the first place, the political society, or nation, unlike any other social group, occupies, or claims exclusive and permanent control over, a definite territorial area, usually of considerable size. At present, whatever may be the case in the future, it acknowledges within that area no right of interference by external authority. Although, in fact, many important nations have agreed to submit certain classes of disputes between one another to judicial or arbitral treatment by international tribunals, of which the Permanent Court of International Justice at The Hague is the most conspicuous example, yet such tribunals have no executive authority, and cannot enforce submission to their decisions within the territory of a recalcitrant nation. Such a submission is a matter of policy, or agreement, not of compulsion. Any attempt by an external authority to cross a national boundary, or to exercise physical force within the territory of a nation, is regarded as a threat to the existence of the invaded nation, and may, in strictness, be treated as an act of war. It is, happily, true, that there is a supremely important and gradually growing body of rules which govern the intercourse of civilized nations, to which, in fact, the name of 'International Law' is usually accorded; and, happily also, it is approaching, by slow though perceptible stages, to a fully articulated legal system, of the juristic type. Nevertheless, it differs, as we shall see, profoundly from the law which is administered by national tribunals within the territory of the nation to which they belong. Consequently, though jurists are, natur-

**Territorial
basis**

ally, deeply interested in this body of rules which bears so close an analogy to the laws which are the peculiar province of jurisprudence, they do not stand to the former in the same relation as to the latter. It is for this reason that 'international morality', rather than 'international law', is regarded by many jurists as a more appropriate name for the rules in question.

In the second place, a political society, or nation, has an organized system of government. That is to say, it not merely claims to control the conduct of its members (as all societies do to a greater or less extent), but it establishes permanent institutions for the exercise of such control. It does not wait until an occasion for control has arisen, and then cast about for means to exercise it; it takes care that, for dealing with such occasions, there shall always be a designated official or body whose function is at once to take the matter in hand. Thus, for the repression of internal disorder, it provides a police system; for the prevention of external attack, an armed force or forces; for the decision of disputes, a system of tribunals; and so on. In populous and highly developed nations, the complex of these institutions is known as 'the State'; and their relations to one another and to the members of the political society of which they are the organs, are summed up in a body of rules known as 'the Constitution'. In smaller or less civilized nations, these institutions may be of much greater simplicity; all powers of government being lodged in the hands of a single individual, with, perhaps, a small body of advisers,

**Organized
government**

The State

and a somewhat larger body of officials, subject to his personal will. But, even in such cases, the autocrat is an institution or permanent national organ, though the individual through whom it functions may be frequently changed. There is, of course, in such cases, nothing that can profitably be called a Constitution; but the existence of a permanent organ of government is essential to the recognition of the nation as a member of the international family.

It is not, of course, contended, that the non-political society is never provided with organs for the control of the conduct of its members. The institution of the chairman, committee, directorate, or council of a purely social group is a familiar feature of social life. But the organization is usually of a simple and rudimentary type, easily distinguishable from the elaborate governmental machinery of a nation on an equal plane of culture.

In the third place, it is a striking feature of the kind of society known as a nation, that the objects, for which it exists, and the amount of control which it claims to exercise over the conduct of its members, are undefined or general. It is true, that any particular institution of government in a State Constitution may be, in fact frequently is, restricted in the extent of the control which it may exercise over the members of the society of which it is an organ. Even the most conspicuous and powerful of State institutions, such as the Congress of the United States or the Reichstag of the German Republic, may have legal limitations imposed upon them, by the Constitution by virtue of which they exist.¹

Undefined
objects

But no nation will ever admit that by no means whatsoever can it create organs with any powers whatsoever ; and this is, in effect, to deny all limitations upon the power of the nation to control the conduct of its members.² In fact, in one conspicuous example, namely, the Parliament of the United Kingdom of Great Britain and Northern Ireland, it is the accepted view that there are no limitations of power at all, other than those set by physical science and the risk of a violent revolution ; though Parliament is only one of the many institutions which make up the complex of the State in the United Kingdom.

Contrast this condition of things with the limited powers of most other groups. The nation is, in fact, acutely jealous of any extension of the powers claimed by such groups which may happen to operate within its territory, and has, in some cases at least, invented a special doctrine, called in England the doctrine of *ultra vires*, to prevent it, of which doctrine more will have to be said later on. Further than this, however tolerant the attitude of the modern State (as, for example, in England) towards the activities of social groups in its national territory, it regards with extreme suspicion any attempt on their part to enforce material sanctions for breaches of their laws. In England, the State has even gone so far as to interfere with the exercise by purely voluntary societies of the inherent right of every social group to expel its own members for breach of its own laws, which they have in effect, by becoming members, covenanted to obey.³ It has also insisted, in certain cases, on the assumption by a class of social groups of a peculiar type

of organization which, despite its undoubted advantages, tends to limit the activities of such groups in many ways. This type of organization is known in England as 'the corporation',* in France as the *personne morale*; and we shall have to consider it somewhat closely at a later stage. In fact, so jealous is the State in England of any attempt by a rival to apply material sanctions, that it actually refuses to allow a private person to bind himself by contract or agreement, whether with an individual or a society, to the payment of a penalty, in the event of an infraction by him of his contractual undertaking.⁴ This modern state of things is, of course, in striking contrast with the conditions prevalent in the Middle Ages, when the State was only one of a number of rival powers; and its emergence is undoubtedly due to the transformation of the feudal into the national State, which marked the end of that period.

Finally, if any further evidence of the unique character of the State be necessary, we may point out that it is the organ of a community which recruits its members without consulting their wishes, though, of recent years, it has, in some cases, recognized the right of such members to withdraw, under certain conditions, from its ranks. The laws which determine nationality vary from one legal system to another; but practically all of them start with the

* For example, in England no group consisting of more than ten individuals can carry on the business of banking except as a registered (corporate) company under the Companies Act, 1929, or some other Act of Parliament or Letters Patent from the Crown (see sect. 358 of the Act named).

general statement that all individuals who satisfy certain conditions with regard to their birth, become, automatically, by the mere fact of birth, members of the nation to which the law applies. Whatever truth there may be in the once popular theory of the origin of the State in a Social Contract or Compact, the theory does not, in practice, hold in any modern nation. The great society of the Nation does not rest on a voluntary basis.

Let us now, leaving the peculiar characteristics of national organization, turn for a little to consider those activities of the State which are specially concerned with its laws, and which, therefore, indicate the sphere of the science of Jurisprudence.

**Jurisprudence
and the State**

It is a matter of common observation, that every modern nation not only claims, but freely exercises, the right to enforce specific rules of conduct, both upon its own nationals, and upon all persons for the time being within its territory. It may well impose different standards upon its citizens and upon resident foreigners, i.e. members of alien nationalities ; but this is a matter within its own discretion, subject to certain rather vague restrictions, based on international comity, against arbitrary or misleading treatment. The right of a nation to exclusive control of its own territory is, naturally, exercised through its supreme organ, the State ; and, as no foreigner can, apart from treaty or invitation, have any legal right to intrude upon national territory, it follows that a State has an admitted power of imposing any conditions as the price of admission. Furthermore, a State claims the right to control the conduct of its own nationals

even when they are outside its own territory, subject to its inability, previously explained, to exercise any executive or judicial authority within the boundaries of any other national territory. Subject to these important limitations, a State may enforce its own rules within its own territory upon any of its nationals in respect of their conduct outside its territory ; though it cannot insist, in the absence of an extradition treaty, upon the State in whose territory such conduct was committed handing over a disobedient national to his own authorities. In other words, the authority of a State to regulate the conduct of its own nationals is both territorial and personal ; its authority to regulate the conduct of aliens is territorial only. It is the territorial element in the laws of the State which is the first difference between such laws and the laws of purely social groups, which may, and, indeed, often do, operate across or regardless of territorial boundaries.

An even more striking difference is the fact, that the vindication or enforcement of a State's laws is far more exact and effective than that of a purely social group. Not only are the laws of the latter less precisely formulated in many instances, so that it is less easy than in the case of a State's laws to decide whether they have been infringed ; not only are their sanctions less precise ; but the purely social group is rarely furnished with the elaborate machinery of courts of justice and police officials which are ordinary, if not universal, features of State equipment. It is, of course, exactly this greater precision of detail, this elaborate machinery for investigating and deciding upon alleged

breaches of the State's laws, which have led to the existence of Jurisprudence as a separate science, and to jurists or lawyers as a specialized profession. For, as we shall later see, this precision and elaboration have produced, not merely an intricate technique for the actual enforcement of the State's laws ; but have also provided, as a kind of shield against the dangers of the law, a system of protective observances, such as documents of various degrees of complexity and solemnity, devices like trusteeships and guardianships, and entries in official registers, which require expert handling by persons familiar with the State's requirements.

Finally, the State's laws differ, both from those of the theologian and of the moralist, in the fact that the State claims and exercises the power of enforcing observance of its laws by precise sanctions of a material character unlimited in extent and variety, from capital punishment to the award of pecuniary compensation by the breaker of a law to the person who has suffered by the breach. Of the general theories of material sanctions and their specific character, something must be said later on.* Here it is sufficient to note that a material sanction is the necessary accompaniment of every law of a modern State. That such a sanction fails, in many cases, to secure observance of the law, is painfully obvious ; and suggestions are from time to time heard, to the effect that the material sanction is an altogether inadequate buttress of a legal system. But such suggestions have at present made little headway ; and it is hard to believe that the State,

**Unlimited
authority**

* Chapter VI.

which owes so much to the military element in its evolution, will ever discard it, at any rate in favour of the slow and uncertain working of public opinion, which is the typical sanction of the law of the moralist. There are more hopeful prospects of reform in other directions.

The very generality of the objects for which the nation, or political society, exists, makes it a task

Ideals of the State of some difficulty to express compendiously the ethical ideals of the jurist who administers its laws. The ' shorthand ' word ' justice ' is, obviously, unsatisfactory, as it is but a paraphrase of the expression sought to be defined. Nevertheless, the very fact that the average layman,* and not a few lawyers, insist on drawing a distinction between ' law ' and ' justice ', usually to the disadvantage of the former, shows that the popular instinct demands the existence of an ideal as the price of its allegiance to a legal system ; and in this, as in so many important questions, the popular instinct is sound. We cannot, therefore, escape entirely the task of suggesting the nature of the ' righteousness ' for which the Law of the State is at least supposed to make.

There is one fortunate fact which tends to lessen the difficulty of this task. While there is great obscurity in our knowledge of the origins of the

* The classical illustration is that of the London cab-driver who, when told to drive to the ' Courts of Justice ', professed his ignorance of their locality. On the direction being repeated in the form of ' The Law Courts ', the cab-driver at once proceeded on his way. The traveller in question was an eminent judge.

physical universe and even of those of the older types of social groups, about the origins of political society, with its characteristic organ, the State, there is more knowledge, even if many details are still unknown. And, as a knowledge of origins is at least a powerful guide to the discovery of purposes, in the origin and history of the State we may well look for the key to its ideals.

It is now generally agreed, that the origin of the typical State, at any rate in Western Europe and the communities formed by emigration therefrom—the crucial step which led to the development of the political society—was the introduction of military into the gentile or patriarchal principles of older communities. The political society was formed, broadly speaking, either by the imposition on a number of such communities of a body of alien invaders who had migrated for long distances through unknown and, probably, dangerous countries, or, more rarely, by the development, within such older communities, of a small group of persons who, consciously or unconsciously, imitated their methods. The circumstances of the migrations had developed a simple but effective organization, aimed at securing the safety of the migrant bands as they made their painful way through the dangers of trackless forests, unfordable seas and rivers, barren deserts, and hostile tribes. Its most conspicuous features were the emergence of the single host-leader (the ‘hero’ of ancient legends), the unquestioning obedience to his authority of every individual in the ranks, the ceaseless watchfulness against the dangers of the route, and the constant readiness of

Origin of the State

the band, at the orders of its leader, to engage in hostilities against every kind of foe.

In many cases, doubtless, the only object of the migrants was casual plunder. But some of the bands came seeking permanent homes ; and, when they settled down in these, were prepared to strike an informal concordat with the conquered inhabitants. By the terms of this concordat, on the payment of tribute and refraining from all attempts at resistance, either to the host-leader himself or his lieutenants under whom he placed them, the conquered communities were for long left to follow their old ways of life, protected from the attacks of other invaders by their new rulers, who were, naturally, quick to resent any attempt to rob them of their conquests. Thus the host-leader of the migration became the first monarch of the new society formed by the union of the invaders and the invaded ; his more important followers became the nobles and councillors of the newly established kingship ; his ruder retainers became the standing army which, on the one hand kept his new subjects in awe and, on the other, defended them against external attack ; while his less warlike servants (though these at first were few) became his tax-gatherers and administrators. This is, in fact, the origin of the greater number of the States of medieval Europe ; though in Scandinavia, and, perhaps, in Scotland, a similar result was attained by the emergence of a native tribal chieftain who succeeded, by similar methods, in establishing a military supremacy over his neighbouring rivals. It is not without significance, that, in practically all great State ceremonials, which are, as is well known,

museums of long-forgotten traditions, the ruler appears in the uniform of one of his armed services, and that the adoption of civilian costume by the President of a Republic is the outward sign that his country has made a violent breach with its past.

If the evolution of the State had stopped at this early stage, it would have been easy to claim, that the righteousness which is the ideal of the jurist's laws could be expressed in the terms 'security' and 'order', with their natural accessories of the maintenance of revenue, and possibly, though this is a slightly later development, the administration of justice.

For good or for ill, however, in Western Europe the development of the State continued. It was easy for vigorous rulers to find pre-
Increase of State authority texts for interfering with the social life of their subjects. The military spirit detests inactivity; it must always be 'getting a move on'. If there are troubles in collecting the State's revenue, the tribute of the conquered, it is probably because the farmer or the pastoralist manages his affairs badly, uses old-fashioned methods. So the State, which, as a great land-owner itself, sets up on its lands superior methods of cultivation—enclosures, large-scale individualist farming, improved breeds of cattle and sheep—endeavours to introduce similar reforms into the old-fashioned farming of its subjects. This policy, not unnaturally, causes disputes and rivalries, which the State undertakes to settle; and a network of State tribunals becomes necessary for this purpose. Out of these disputes gradually emerge the outlines of a Law of Property. In order that

it may be able to pay its soldiers, the State sets up a monopoly of coinage, and issues strict injunctions against its export from the country. This, again, leads to severe regulation of foreign commerce, and the theory of a 'balance of trade', which is violently opposed to the traditions of primitive commerce. A sweeping pestilence threatens to upset the social order, upon the prosperity of which the State depends for its existence. Again the ruler and the governing classes feel compelled to undertake a reconstruction. From the very first, in Western Europe, the State allied itself with the influential power of the Church, and thus became involved in ecclesiastical affairs. Schism in the Church was inevitably followed by wars between the States which espoused different sides. The age-long rivalry of State and Church led to interference by the former in the affairs of the latter, and, consequently, to a further enlargement of the scope of the State's action. For long the State stood aside from such purely social matters as education, public health, and the relief of poverty ; but, as the feeling grew, with each new development of political activity, that the apparently boundless power of the State was the one hope of distressed humanity, all attempt to restrict the operation of State activity died away, and discussions on its limitations became a mere academic exercise.

On the other hand, the reflex action of the older institutions upon the State itself is equally clear. One of its first effects was to turn the position of the host-leader, originally, no doubt, chosen by some rude form of popular acclamation, of which

**Influence
of older
institutions**

faint traces still survive in coronation services,* into an hereditary kingship of the patriarchal type. Still greater changes resulted from the expansion of the feudal council of nobles and ecclesiastics, in the thirteenth century, into a partly representative Parliament or States-General; for the elected representatives were, in most cases, originally chosen by the communities which survived from a pre-political age, the provinces, cities, communes, guilds, and the like. The linking up of central and local government which has been so striking a feature of recent political development in Europe has still further increased the scope of the State's authority, by bringing it more and more into touch with the daily lives of its subjects.

It is not, perhaps, surprising, in view of these developments, that something like a theory of the omnipotence of the State, which is the internal counterpart of its international independence, has joined hands with the latter to produce the famous doctrine of State sovereignty, which we shall have to discuss with some care at a later stage. Nor, in view of these facts, is it surprising, that the feeling should have grown up, that the object of the State's existence, under modern conditions, is to give effect to the general will of the nation, and that the test of the righteousness of the laws of the State is the extent to which such laws reflect the national will.

This is, however, a dangerously wide theory, which might have deplorable results. Moreover,

* It is said, for example, that, in England the boys of Westminster School represent the shouting warriors who bore their chosen leader on their shields.

it is not in harmony with historical facts. Broadly speaking, the modern State is the product of the union of military strength and efficiency with social activities. Military strength and efficiency are largely (though not wholly) destructive in character ; their ethical justification is their value as the guardians and protectors of the constructive energies of the nation. The Law of the State makes for righteousness only when it acts as a guardian of social life ; either by resisting the foes, internal and external, which threaten that life, or by stimulating that life to further activity. The harmony which is the seal of its success, is the harmony of individual interests with the general good.⁵

CHAPTER II

METHODS OF JURISPRUDENCE

I. ANALYSIS

THE jurist, in studying the laws and institutions which are the subject-matter of his science, makes use of three, possibly four, methods: the analytical, the historical, the comparative, and, if this can be said to be a separate method, the critical.

By the first, which, by reason of its supreme importance, both to the theorist and to the practitioner, may, perhaps, be regarded as the dominant method of jurisprudence, the jurist takes a section of an Act of Parliament, a crime as defined by the unwritten law, or a legal institution such as a contract, and resolves it into its constituent elements, as does a chemist who analyses a chemical compound. Not only is this process a valuable intellectual exercise; it is one of the surest keys to the kind of problem which it is the daily task of the practitioner to solve. For example, an English practitioner is called upon to draw up a contract, on the faith of which his client is about to risk a large sum of money. Before starting on his task, if he is properly trained, he realizes that the institution to which the apparently simple name of 'contract' is given, is really

**Analytical
jurisprudence**

**Examples of
the analytical
method**

a compound comprising at least four elements, the absence of any one of which from the projected arrangements will be fatal to his client's security. Thus the practitioner must be careful to ascertain (i) that there are at least two parties of adequate legal capacity to enter into the arrangements, (ii) that these parties thoroughly understand and agree to what is proposed, (iii) that a 'valuable consideration' (a highly technical concept itself requiring further analysis) operates between them, (iv) that one party at least binds himself to a specific and unmistakable obligation or series of obligations of a character to which the law takes no exception. In the case of certain important classes of contracts, the practitioner, if he wishes to enable his client to give effect to the arrangements in the event of a breach by another party, must take care to embody the contract in a certain form, which may either be absolutely essential to its validity or merely necessary for its full enforcement. As a practitioner would put it : there must be parties, consent, valuable consideration, a precise and lawful obligation or undertaking, and, perhaps, a form.

Or, again, an English practitioner is retained to defend in court a man charged with theft ('larceny'). The layman has a general idea of what constitutes theft, which he will perhaps define, in an artless way, as 'depriving a person of his property'. Even the inadequately trained lawyer knows that this is an altogether unsatisfactory formula, and that an indictment framed in such words need cause his client no anxiety. But it is unlikely that the prosecution will allow him such

an easy victory ; and he prepares himself to meet a technically correct charge of larceny. If he is not already an expert in the subject, he will study the textbooks, statutes, and cases dealing with larceny, and from them will gather that, to succeed in securing a conviction, the prosecution will have to prove at least four facts, viz. (i) the existence of a movable object of a material kind, (ii) knowledge on the part of the accused that this object is not his own, (iii) physical movement of it (however slight) by the accused from the possession of the prosecutor, (iv) an intention on the part of the accused to deprive the prosecutor permanently of it.* Failure on the part of the prosecution to prove, to the satisfaction of the jury, the existence of any one of these facts, will be fatal to the prosecution ; and, consequently, the accused's counsel will scrutinize the evidence put forward by the prosecutor, with a view to securing, by argument or counter-evidence, such a result. Conversely, the prosecuting counsel will carefully marshal his evidence and arguments to convince the jury of the existence of these four elements in the case.

Nor must it be supposed, that a simple process of this kind exhausts the possibilities of analysis, even in cases such as we have assumed. After the major elements of the problem have been resolved, it will quite commonly be found that one or more of these is capable of further analysis, which may

* The older, and (it is submitted) much better requirement would have put this last element as an 'intent to convert the article to his own permanent use'. But the words in the text are those of the Larceny Act, 1916.

have important results. For example, every contract, in English law, as has been said, requires the consent and understanding of the parties. What is implied by consent and understanding? For a complete answer to this question an expert knowledge of psychology, which cannot be expected of the ordinary practitioner, will be required. But even the practitioner, if he is to do his client justice, will have to realize that it involves an identity, or, at least, an apparent identity, of apprehension by both parties as to the terms of the contract, freely arrived at, by sane minds, of persons endowed with legal capacity. The practitioner will probably not put the matter that way. He will ask himself whether there is any evidence of mistake, fraud, insanity, or infancy. This is, however, mere rule of thumb, which would not satisfy a scientific jurist, who would concentrate, not on the forms which defects may assume, but on the defects themselves.

Nor should it be assumed, that the method of analysis is applicable only to the rules of specific legal systems, such as the English. Jurisprudence, which is the science, not of English, or French, or German, or any other system, of national law, exclusively, but of national law generally, finds it equally useful for the treatment of legal concepts which are, broadly speaking, common to all legal systems in an advanced stage of development. Take, for example, the familiar and important concept of ‘delivery’ of goods (i.e. corporal transfer of movables). The layman is apt to look upon this as the simple unilateral act of the deliveror. But an analysis of the concept by a jurist reveals the

fact that at least three elements are involved in it, viz. (i) withdrawal by the deliveror from possession of the goods (*Besitzraumung*), (ii) an indication by him that the deliverer or consignee is at liberty to take possession of them (*Willenserklärung*), and (iii) taking of possession by the consignee (*Besitzgreifung*). If any one of these elements is absent, there is no 'delivery'; and, inasmuch as 'delivery' is a constituent part of such common legal transactions as sale, hiring, deposit, carriage, and gift, and is, moreover, frequently material in the proof of such criminal and civil offences as theft, embezzlement, trespass, conversion, and negligence, the importance of a clear understanding of its nature by the jurist is apparent.

The value to the jurist of the analytical method is, indeed, so obvious, that it is hardly necessary to labour it. But, before passing on to other methods of jurisprudence, it may be worth while to note, that this value is nowhere more conspicuous than in an attempt to grasp the nature of national law itself, the general subject-matter of Jurisprudence.

We have already provisionally defined Law as the force, or tendency, which makes for righteousness; and we have segregated from Law, a world-force, that aspect of it which is concerned with the working of a political society or nation, as the peculiar province of Jurisprudence. We have now to bring the analytical method to bear on law as it concerns the jurist.

It is of the essence of a force that it should exercise pressure, and, in the case of psychical force,

Extension of
method

that the pressure should be exercised on human beings. It would appear, therefore, that one element which should be found in every law of a psychological kind is, that it should operate upon human beings. This it may do by affecting their beliefs or their conduct. Fortunately, the absurdity of attempting to influence beliefs by the application of material sanctions has at length become apparent. And so the laws of the State, with which alone the jurist, as such, is concerned, have long since ceased, at any rate in communities of an advanced type, to attempt to control the beliefs of its subjects.

Analysis of the concept of law

Desire to influence conduct

We find therefore, that the first essential element of a law, in the sense of the jurist, is that it should aim at affecting human conduct.

So far as the form of a law is concerned, this fact may not always be apparent. For example, a form which seems to have a special attraction for the framers of many modern Constitutions has, apparently, no immediate bearing upon conduct. These laws are stated rather in the form of abstract propositions than of injunctions, and are known as 'declarations of fundamental rights', or 'constitutional guarantees'. Thus, for example, article 109 of the Weimar Constitution of the German Reich declares that "all Germans are equal before the law". The first article of the Polish Constitution of 1921 states that "the Polish State is a Republic". Title I, section 2, of the Constitutional Charter of 1918 of the Republic of Czechoslovakia lays it down that Czechoslovakia is "a democratic Republic with an elected President as

its head". Taken literally, these sentences are mere statements of fact. But a reasonable interpretation of them leads to the conclusion that they are intended to impose upon all persons within their orbit a course of conduct consistent with them, and to stamp as illegal any conduct which aims to change them, otherwise than by constitutional means. From the point of view of the jurist, whether a theorist or a practitioner, they are not an ideal form of law; for not only do they fail to indicate with clearness the persons intended to be affected by them, but also to specify the precise acts and forbearances which they aim at controlling. Their psychological value to the statesman may, however, be admitted; and it is the task of the jurist to apply them to concrete facts.

But whilst almost all jurists would agree that the aim of their laws (indeed of all psychical laws) is to influence human conduct, there is a singular absence of discussion, in the works of scientific jurists, of the nature or meaning of 'conduct'. 'Conduct' is assumed by them to consist of human acts, forbearances, and omissions; but this is rather a list of the ways in which conduct manifests itself than a definition of conduct. And, in view of the fact that conduct plays so large a part in the concept of Law, it may be worth while to consider whether a brief examination of its nature may not aid us in our analysis of that concept.

Conduct may fairly be described as a subdivision of the larger category known as 'behaviour'. We

Conduct speak of the 'behaviour' of human beings, of animals, and even of trees and plants; meaning their outward and visible

reactions to a stimulus of some kind. All living things are capable of behaviour ; and it is impossible to avoid the belief that, by some process or another, the reaction of which behaviour is the manifestation, is the consequence of some external influence, acting, probably, through some kind of internal organization. In the case of trees and plants, the stimulus may be produced by such influences as sunshine and rain, fertilizers and cultivation. In the case of animals, in addition to these physical influences, there may be such non-material influences as fear, affection, hunger, and the like, which produce the reflex reactions which we call 'behaviour'. The same is true also of human beings.

But human beings, in addition to reflex actions, are capable of actions resulting from conscious deliberation ; in other words, they are capable of forming, and do constantly form, judgments, which, in the case of normal persons, are followed by conscious acts * and abstentions. These acts and abstentions we call 'conduct' ; and we draw a well-marked distinction between conduct and mere behaviour. It is even possible, that this distinction is the juristic counterpart of the psychological distinction, of which so much has lately been written, between the conscious and the unconscious self ; but to follow up this speculation would lead us too far afield. We must content ourselves with the juristic explanation of the distinction

* Of course including speech. The popular distinction between 'word' and 'deed' conceals one of the most absurd of fallacies. Speech is not merely action, but action of a peculiarly effective kind.

between conduct, which it is the aim of the jurist's laws, as of all psychical laws, to influence, and mere behaviour, which, for the most part, Jurisprudence treats as being beyond its sphere of influence.

The fact that a human being can form judgments, implies, almost necessarily, that he has the power of choice. A decision to follow line A, very frequently means, despite the determinists, a rejection of line B, possibly also of lines C, D, and so on. More than that, it is, again almost of necessity, succeeded by a *desire* to follow line A, which, through the peculiar human faculty known as the will, contracts, in normal persons, certain muscles of the body—i.e. results in action or deliberate forbearance from action. It is, therefore, the immediate object of all psychical laws to influence the human will in such a manner as to stimulate it to inspire the subject's conduct in the direction of rightness, or righteousness.

Unfortunately, however, the human will may, unless forewarned or influenced in the 'right' direction, be stimulated, not towards
Sanctions action in that direction, but in a totally opposite, or, at least, different direction, by influences of many kinds. To meet this difficulty, it is deemed necessary for the lawgiver to influence the human will in the desired direction by the promise, or threat, of sanctions, i.e. rewards or penalties, as a safeguard against refusal to conform to the law. This important element in the concept of the State's law will be the subject of detailed examination at a later stage ; * here it must suffice

* See Chapter VI.

to point out that, as has been said, its object is to counteract any tendency towards resistance to the law.

A difficult question in the process of analysing the concept of law here arises. So far it will be seen, the human will is the pivot of its operation. But cannot law deal also with mere omissions, involving no mental element at all? Whatever may be the case with the laws of religion and morality, there can be no doubt that systems of State law have, in practice, to make provision for such events. A railway signalman, by pure inadvertence, omits to pull a certain lever; and, as a result of his omission, a serious accident occurs, resulting in loss of human life. From the religious and moral standpoint he may be blameless; but most systems of State law provide that, if the signalman were clearly under a duty (an expression to be hereafter explained) to pull the lever, and did not do so, he would bring upon himself a sanction of a greater or less extent. Yet it is difficult to see how the sanction can have had any effect upon his judgment.

This apparent inconsistency in the theory of the operation of law would seem to be explicable in more than one way. An obvious suggestion is, that the legislator (to use a compendious and not very exact term) believes that the promise or threat of a sanction has an effect upon the mind of its subject which influences that mind towards a greater alertness, or his memory to a greater activity, than it would otherwise display, and thus reduces in number the cases of forgetfulness. It must be left to the psychologist to decide whether

this belief has any foundation in fact. Where the omission in question is of an act directly enjoined by law, it may be well doubted whether the theory has any justification in logic ; and it may, perhaps, best be explained by the well-known dictum of an eminent jurist, whose knowledge of law, both in theory and practice, is profound, that ' the life of the law has not been logic ; it has been experience '.¹ On the other hand, there is a growing reluctance on the part of judges and magistrates to apply the theory in its full strictness, again only where the act omitted was directly enjoined by the law. Where performance was undertaken by the voluntary engagement of the defaulting party, as, for example, when it is made a condition of a contract of insurance that the insured shall give notice of a loss within a specified time after its occurrence, the practice of applying the sanction of nullity to a merely forgetful omission is justified on the general ground of the sanctity of contracts. Even here, however, English Law has, especially in recent years, shown an inclination to relieve against the strict application of the rule.²

The importance of the legal sanction in the theory of the operation of the laws of the State, has led an important school of jurists to attempt to simplify the theory by the insistence that every law is a species of command. A command is defined as an expression of a wish by a superior that an inferior shall adopt a certain line of conduct, accompanied by a penalty in the event of disobedience.³ It is a fact worth noting, that the two most prominent

Law as a
command

exponents of this view among English jurists, Hobbes and John Austin, happen to have been, by the circumstances of their lives, closely associated with military affairs—Hobbes in the turmoil of the Civil War in the seventeenth century, and Austin as a subaltern in a marching regiment during his most impressionable years at the beginning of the nineteenth. Moreover, it is deliberately stated by the latter's widow, in the touching memoir which she prefixed to the posthumous edition of her husband's works, that "he retained to the end of his life a strong sympathy with, and respect for, the military character, as he conceived it".⁴ In view of the large part played by military ideas in the evolution of the State, previously suggested,* the views of these jurists, and their numerous followers,⁵ cannot be dismissed as personal idiosyncrasies. Nevertheless, it seems now agreed by the more modern school of English jurists, of whom Sir Frederick Pollock is an eminent representative, that such a shorthand explanation of the nature of law—even of the kind of law with which Jurisprudence is concerned—raises more difficulties than it allays. For example, it is a rule of English Law that (with certain limited exceptions) a will or testament is ineffectual unless it is embodied in a document whose signature or acknowledgment is attested by two witnesses. In what sense can this law be said to be a command? It was certainly a doctrine of the medieval Church that a man who died intestate ran rather serious risks; but to argue from this doctrine (which had a sound practical justification from the standpoint

* Chapter I, pp. 20-23.

of the Church) that modern English Law commands English men and women to make wills in a particular form, is ludicrous. The rule certainly does affect the conduct of the propertied class ; because the members of that class, being usually desirous of controlling the devolution of their property after their deaths, for the most part take care to adopt the form which is essential to effect their desires. But, so far as the author is aware, there is no evidence that the Parliament which enacted that section of the Wills Act, 1837, which embodies the rule, desired to encourage the making of wills. What it did desire to do was to prevent the disappointment caused to the intended beneficiaries by vague and informal wills, and to discourage the waste of time and money caused by unnecessary lawsuits. But such a desire hardly comes within the definition of a command.

Up to this point, our analysis of the jurist's law has discovered in the concept four elements, viz. (i) the desire of the nation, expressed through its chief organ, the State, to influence the conduct of persons within its jurisdiction, (ii) in a direction deemed by the nation to be ' right ', (iii) by the threat of material penalties or, possibly, by the promise of material rewards,* (iv) which sanctions will be administered by tribunals or other machinery set up by the State for the purpose. Is this list exhaustive ?

There can be little doubt that some jurists of

* The practice of offering money rewards to ' common informers ', i.e. persons who had no direct interest in the offences which they denounced, was at one time very prominent in English Law. It is not, even now, extinct.

eminence would answer this question in the negative. For example, some of them assert that there can be no true law, unless there is an element of generality in its application. Thus, John Austin, whilst criticizing the precise nature of the generality demanded by his predecessor, Sir William Blackstone, accepts in principle the view which he attributes to him.⁶ He requires of a true law, that it shall enjoin acts or forbearances *generally*, whether by an individual or a class. Sir William Markby apparently inclines to the view attributed by Austin to Blackstone, that the generality required is to be found in the number of persons whose conduct is intended to be controlled.⁷ Dr. Holland, whom it is not unfair to class as a member of the Austinian school, also seems to demand an element of generality in the law; but he passes lightly over the point.⁸ Sir Frederick Pollock and Sir John Salmond do not, apparently, discuss it at any length; but, in their definition of the jurist's law as a body of 'rules', they may be said to accept, at least in some degree, the requirement of generality in a true law.⁹ On the other hand, the more recent work of an eminent French jurist, M. Henri Lévy-Ullmann, of the University of Paris, in a volume devoted entirely to the definition of law, but proceeding on lines wholly different from those followed by English jurists, seems to attach no importance to the demand for an element of generality, regarding law (*droit*) simply as a boundary set between liberty and restraint.¹⁰ An equally eminent German jurist, the late Rudolf Ihering, defines (juristic) law as 'the contents of a State-enforced compulsion',

and its object as 'the defence of social life conditions through the power of the State'.¹¹ Nothing here of generality.

Nevertheless, it can hardly be doubted, that certain modern sentiments of considerable power are behind the demand for an element of generality in law. One of these is derived from the vivid impression made on the minds of thinking men by the study of physical science, which appears to show that certain physical laws govern a vast mass of phenomena, and have, apparently, done so from time immemorial. This discovery seems to offer a model for humanity to imitate. It suggests that permanence and uniformity are ideals to be striven for. Permanence appeals to the conservative instincts of mankind, uniformity to its democratic, with their demand for 'equality before the law', a demand which has been answered by the almost complete abolition of legal privileges in modern legal systems. Still, permanence and uniformity are not quite the same things as generality.

The doubt may be considered from a practical standpoint. In the seventeenth century in England, Acts of Attainder were not infrequent events. In the eighteenth, Acts of Parliament conferring pensions on distinguished individuals were common; and in the nineteenth they were not unknown. Acts of Parliament effecting 'settlements' of individual family estates were at one time quite numerous. Each of these statutes affected only single individuals or very small numbers of individuals; thus they do not satisfy the test of generality attributed by Austin to Blackstone. Suppose an Act to be passed order-

ing the closing of London Bridge to traffic for a single day or hour. That would hardly satisfy the test of continuity demanded by Austin himself. Yet it can hardly be doubted, that a Court of Justice would enforce any or all of these statutes in precisely the same way as any analogous law of unquestioned validity. It is submitted that the demand for generality in the laws of the State is rather an aspiration than an essential, and is not confirmed by the method of analysis.

To the concept of the jurist's law, as ascertained by the method of analysis, the name 'Positive law' 'positive law' has been assigned by Austin, who, apparently, borrowed it from his German contemporaries ; and it has been adopted by certain of Austin's successors. But it would appear to be a singularly infelicitous title, at any rate for English use. Whatever may have been the meaning put upon the word 'positive' by its German inventors, the meaning attributed to it by Austin himself is arbitrary in the extreme. He admits that (according to his view) " every law properly so called is a positive law. For it is put or set by its individual or collective author, or it exists by the position or institution of its individual or collective author." ¹² But then, Austin goes on to say, it is necessary to have some term to distinguish human law from divine law, which is also ' put or set ' by its divine author ; and so he chooses the term positive for the former ! Why the obvious suggestion of ' human law ' did not appeal to him does not appear. It would certainly seem to have the merits of simplicity and clarity, qualities which can hardly be claimed for the word ' positive '.

The objection that it fails to exclude such laws of human origin as are not within the special province of the jurist would not, of course, have appealed to Austin, with his rigid definition of a law as a command of the sovereign power in a State ; for he regarded all other human laws as mere ' morality '. We, who have seen reason to take a more liberal view of the concept of Law, must be content to solve the difficulty by some such phrase as ' laws of the State ', or ' law in the juristic sense ', or ' national law '. Dr. Holland and Sir John Salmond appear to take over the phrase ' positive law ' from Austin or his predecessors, but without laying much stress upon it.¹³ On the other hand, Sir Frederick Pollock, in his admirable *First Book of Jurisprudence*, seems to get on very well without it ; and, with that great authority to support us, we may, perhaps, be allowed to suggest that ' positive ' is unnecessary to Jurisprudence as a term of art. The fact that the term ' positivism ' has, since Austin's day, become the name attached to a well-known school of philosophy, founded by Auguste Comte, and important in its time, seems to be an additional reason for not using the term in connection with Jurisprudence, which has little to do with Comtian philosophy.

But we must now turn to the other methods of Jurisprudence.

CHAPTER III

METHODS OF JURISPRUDENCE (*continued*)

2. HISTORY ; 3. COMPARISON

THE emergence of the historical method in the science of Jurisprudence dates from the epoch-making work of Charles Darwin in the middle of the nineteenth century. It is, of course, true that, in England and elsewhere, eminent jurists had, long before Darwin's day, appealed to history both as a practical means of enforcing their arguments, political or legal, as in the cases of Coke and Prynne, or in the interests of pure learning, as in those of Selden and Hale. It is also true that, at the end of the eighteenth century, a specifically 'historical' school of jurists grew up in Germany, headed by Savigny, in opposition to the reforming and codifying spirit engendered by the French Revolution. But the energy of Savigny and his followers was concentrated mainly on asserting that Jurisprudence was an inductive science, whose chief work was to build up a national law on spontaneously developed social rules, rather than on *a priori* deductions such as stimulated the theorists of the classical school. And, in almost all cases, the efforts of these distinguished jurists were directed to the field of what we should now call legal history, rather than historical jurisprudence, i.e. to the records of a

Older historical school

particular legal system rather than to the biology of legal ideas and institutions. It was not until Darwin had formulated the famous theory of evolution, that the possibility of generalizing in a similar way on the development, not merely of single systems of national law, but of the concept of law as a force which might be expected to work with some degree of uniformity in communities in a similar stage of civilization, commended itself to jurists ; though, naturally, the connection between legal history and historical jurisprudence is close. The former is, in fact, the great storehouse of materials from which the conclusions of the latter are drawn ; just as the work of the anatomist, the botanist, the zoologist, and the physiologist, yields the materials for the biologist.

The opening of the new era was signaled by the brilliant work of Sir Henry Maine, *Ancient Law*, which appeared in 1861, two years after the publication of the *Origin of Species*, followed by other works on similar lines. England can also boast of the inspiring influence of Frederic William Maitland, who, though he humorously professed some distrust of ' general jurisprudence ', yet produced rich material for the legal biologist to explore. In 1882 appeared the stimulating work of Mr. Justice Holmes, for many years an ornament of the Supreme Court of the United States, entitled *The Common Law*. The lead thus given was worthily responded to in America by J. B. Thayer in his interesting *Preliminary Treatise on Evidence* (1898), and by J. B. Ames in his remarkable essays on Assumpsit (1888) and Trover (1898). On similar lines France

New historical
school

has produced the work of Esmein (*Études sur les contrats dans le très ancien droit français*, 1883), and the contributions to the study of primitive law of Dareste. Germany can show a list of distinguished names, such as those of Rudolf Sohm (*Prozess der Lex Salica*, 1867), Heinrich Brunner (*Entstehung der Schwurgerichte*, 1872), G. L. and Konrad v. Maurer, and Rudolph Ihering, whose fascinating posthumous work, *Vorgeschichte der Indo-Europaer*, opened up possibilities of research into sources earlier than those examined by Maine. Spain has produced Altamira, Italy Calisse, and Russia Vinogradoff and Maxime Kovalevsky.

If any justification of a method sanctioned by such names as these were necessary, it is, surely, obvious, that a science which must, by reason of its close association with human progress and change, be itself constantly changing, can only be studied intelligently if its history is understood. For the method of analysis, great as is its value to the jurist, has its limitations, in that it assumes static conditions in its subject-matter; whereas the laws of the jurist, like life itself, are not a being, but a becoming.

While, admittedly, the value of the historical method in Jurisprudence is less to the practitioner than to the theorist, it cannot be doubted that it is often of direct value to the former. Take an extremely simple case. A and B are rival claimants of certain land. A bases his claim on a devise to his grandfather, which took effect in 1876, of a newly created entailed estate or interest in the land, i.e. an

**Value of the
historical
method**

**Practical
example**

estate which descends, according to the rules of intestate succession, or 'inheritance', only to the issue of the donee. A claims to have become, on the death of his father, X, the heir-in-tail under the devise of 1876. B, on the other hand, claims under a direct devise from X, who died in 1923. B's lawyer, who regards the historical method as 'mere antiquarianism', is perfectly well aware that, at the present time, existing entailed interests are devisable. He accordingly examines X's will with care, ascertains that it was duly executed, that X was of full age when he made it, and that the property belonged to X at the time of his (X's) death. He advises B accordingly that he has a good case, and commits him to considerable expense. A's lawyer, on the other hand, knows something of the history of English land-law, and is, therefore, aware, that the power of devising an existing entailed interest only came into existence in 1926, and, even then, only in respect of wills executed or republished after 1925. He advises A to contest B's claim, and wins his case.

This is, perhaps, too glaring an example of ignorance to be common; though, if certain advocates of so-called 'practical' education had their way, it might occur at any time. It is, perhaps, fairer to take a slightly less simple example. Every student of the history of the English Law of Torts is aware of the difficulties besetting a practitioner who has to deal with a case of 'pure' negligence, i.e. negligence not arising out of, or being, a breach of contract or trust. It is believed that, in English

**Another
practical
example**

Law, negligence, in that sense, has never been formally defined, at any rate by statute. A fairly accurate definition for legal purposes is : failure to show that care or skill which the law expects one person to show towards another in their relationship and the other circumstances of the case, as a consequence of which that other suffers loss which is measurable in pecuniary damages. But such an elastic definition evidently leaves a wide margin for difference of opinion as to whether negligence occurs in a given case.*

First of all comes the important question : is negligence a matter of fact or law ? Or, to put it more technically, a matter for the Court or the jury to decide ? We may take the familiar class of cases of alleged negligence arising out of the sale or bailment of articles which afterwards, by inherent defect or careless handling, cause damage to a third party. Originally (and the English law on the subject is not very old) it was a pure question of fact, not merely as to whether the defendant did in truth omit any reasonable precaution to prevent the damage, but also whether he was, by reason of the circumstances, bound towards the plaintiff not to do so. Now an examination, in historical order, of the series of reported cases on pure negligence will show that the Courts, with long experience of the findings of juries in such cases, are continually occupied in diminishing the uncertainty necessarily existing when facts are left to the unfettered handling of a series of lay tribunals having no personal relationship with one

* On the important legal concept of ' negligence ', more will be said hereafter.

another. This they do by embodying the essence of the verdicts of such tribunals in definite rules, thereby making them part of the law. As Mr. Justice Holmes puts it, perhaps with some picturesque exaggeration :

" From the time of Alfred to the present day, statutes and decisions have busied themselves with defining the precautions to be taken in certain familiar cases ; that is, with substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts or omissions." ¹

Consequently, it becomes vital to the practitioner, engaged in handling a case of this kind, to realize the tendency of the Courts ; for, if he can be reasonably sure that, if he proves his facts to the satisfaction of the jury, the Court will then direct the jury that they must find negligence, or not, as the case may be, he can advise his client to contest the case. And this the practitioner can only do by a thoughtful study of the precedents in their historical order, observing how the later differ from the earlier and in what direction they tend. Needless to say, in border line cases the Court will be bound to follow a similar process ; and, therefore, to judges and counsel alike, the use of the historical method in such cases is essential.

But it may be candidly admitted, that the use of the historical method is even more important to the scientific jurist than to the practitioner. It enables the former to make those generalizations which are the distinguishing marks of a science, as contrasted with a mere bundle of technical rules. It enlarges his intellectual horizon, and enables him to grasp the pregnant definition by Montesquieu of

**Theoretical
value of
method**

law in the widest sense as " the necessary relations which result from the nature of things ". Being, unlike the practitioner, not bound by authority, he may be able to point out, from his study of legal development, how certain lines of legal policy have succeeded, and others failed, in achieving their ends. Not least important, if he happens to be a teacher, the use of the historical method enables him to arrest the attention of his students by vivid illustrations drawn from early stages of legal development entirely strange to modern conditions. When, for example, the student realizes that the (to him) illogical process visible in the ancient Welsh and Irish Laws, and still practised in the East, known as ' sitting *dharna* ', by which a creditor endeavours to impress his debtor by threatening to starve himself (the creditor) to death unless the debtor pays up,* is a direct spiritual ancestor of the common modern writ of summons, the student feels that the science of jurisprudence may, after all, not be quite so dreary as it is sometimes represented to be.

There are at least two directions from which the historical jurist may approach his task. He may either take some definite legal phenomenon, or *Rechts-institut*, which appears in his own or another system, and trace it back to, or forward from, its earliest germ, or he may take the concept of law itself, as a social force, and perform a similar operation upon it. We may illustrate these ways by examples.

Thanks to the labours of legal historians, we

* The implied threat is, that the creditor's ghost will haunt the defaulting debtor.

know a good deal of the development of the important institution of Contract in Western Europe. The institution is now so familiar, not only to jurists, but to all men of affairs, that, unless they have made a special study of it, they are inclined to regard it as an essential feature of every civilization worth the name. It comes to them somewhat as a shock to find that, in England for example, this institution, in its present elastic form, is a very modern thing ; that the great Blackstone himself, in his famous *Commentaries on the Laws of England*, one of the most popular law-books ever written, so late as the latter half of the eighteenth century treats Contract in a distinctly offhand manner, as a mere incident of title to some kinds of property. Blackstone was perfectly justified, from his own point of view, in this attitude, by two considerations. He wrote as an exponent of the Common Law, i.e. that part of the customs of the realm which was enforced by three specific tribunals at Westminster. These were, undoubtedly, the most important tribunals in the land ; but they were not the only tribunals. The bulk of the cases of contract in Blackstone's day were not decided in those Courts, but in the various Courts administering the Law Merchant, and, to an important extent, in the Court of Chancery. Again, though even the Common Law had, in Blackstone's day, a vague theory of the simple or formless contract, which was, in fact, a good deal more liberal than the corresponding theories of most Continental countries, it was mixed up, in a confused way, with technicalities of procedure,

with which Blackstone, as a teacher of youth destined to become country gentlemen, magistrates, and legislators, was not specially concerned. If he had been criticized for this apparent disrespect to the institution of Contract, he might have replied, that he did not deem it useful to discuss the mysteries of Assumpsit with his students. For those of them who did not intend to become lawyers, they were unimportant; those who did would soon pick them up in a pleader's chambers or an attorney's office.

In fact, if we trace back the history of Assumpsit as it has been related for us by Ames and other investigators,² we soon reach a time at which all traces of its contractual character seem to disappear. The view that people should keep their engagements because they have entered into them is, apparently, absent. If one can generalize safely at all on such a matter, the idea rather is, that a man is a fool if he does so when it doesn't suit him. But there are, apparently, two social conventions which are enforced by the State. One is that, if a man holds himself out as doing a certain kind of business—carrying, innkeeping, farriery—he cannot refuse to undertake it when asked, for any one prepared to pay the customary fee. The other is that, if such a man does his work so badly that the article entrusted to him for the purpose is damaged, e.g. if the horse handed over to be shod or ferried is lamed or drowned through the fault of the farrier or ferryman, these latter must pay damages. It may be that the emergence of the last rule was assisted, in English law, by the comparatively recent inven-

Holding out

tion of a new form of action, Trespass on the Case, under a famous clause of the Statute of Westminster the Second (1285); but it seems to be equally likely that this new form was invented to give effect to the popular view.

It is possible, of course, to argue, that this state of things can be expressed in terms of Contract; and it is even possible to clothe it in the later form, so plausibly stated by Sir William Anson, of Offer and Acceptance resulting in a contract. The defendant may be said, in such cases, to have offered to do the work properly in consideration of the customary payment, and the plaintiff to have accepted the offer. But a truer view would seem to be, that the defendant was, by reason of his calling (to which he may have been appointed by a community, such as a village), to have become in a sense an official of the community, bound to do what work of that kind was wanted, being paid by fees, a very common arrangement in medieval times. In other words, the State, anxious to strengthen its hold on the community, undertook to enforce a custom which had already made its appearance, and was, quite possibly, earlier enforced, in a less effective manner, by a popular tribunal.

Going back a little further still into the history of Contract, we come upon a yet more primitive idea.

The 'bond' Two of the most familiar contracts of later times are suretyship and pledge. They seem to spring from the same root; and this root does not at first sight look very contractual. A has a grievance (not in the least 'contractual') against B which, by the social morality of the time,

justifies him in capturing B, if he can, and holding him prisoner till he ransoms himself by payment of a cattle-fine or other compensation. He captures B, who pleads to be allowed to go and raise the cattle to pay the fine. A, naturally, refuses the request unless B will leave with him some security against being deprived of his advantage by the fact that B does not return or pay the fine. The security may take the form either of some kinsman who consents to be literally 'bound' in B's place, or of some valuable chattel from which A can at least extract compensation. The latter practice (*wed*) is the direct ancestor of the modern system of pledge and mortgage (the Scottish 'wadset'), in which the property pledged or mortgaged still plays the part of security for the creditor that the debtor will pay his debt. The former is suretyship (*borh*), and, to this day is quite commonly effected, not by the surety remaining in custody, but by his entering into a 'bond', i.e. an instrument of peculiar solemnity, which will be enforced by the State in case of default. It is significant that this instrument, though now regarded as a 'contract under seal', is not framed in contractual language at all. X is "held well and truly bound to A in the sum of £——". But a condition is attached, to the effect that if X pays A a smaller sum (usually one half) by a certain day, the bond shall be void, "otherwise to remain in full force and effect". Thus the necessity for the actual custody of the surety is avoided; but he is kept, as it were, on a string or chain. Where the transaction is imposed by the Court itself, the 'bail bond', as it is called, actually commits the custody of the delinquent to the

surety, who can arrest and deliver him over to justice if he tries to escape. The surety is the 'bail' or 'bailee' of the delinquent's body. Thus the modern contract of suretyship, which can be applied to all manner of engagements, carries us back to the primitive days of law, when its chief object was to convert the ancient 'right' of corporal vengeance into an ordered submission to the State's tribunal. And out of that effort have developed ideas and practices which have given us the far-reaching and important theory of modern Contract. The tracing of that process of development has, incidentally, also thrown not a little light on the evolution of law.

Can we go further, and apply a similar method to the concept of law itself? That is, obviously, a more difficult task; but the mass of evidence which, of late years, has been collected, of the usages and beliefs of primitive communities, makes some tentative suggestions possible.

**The evolution
of law**

The institution which, in communities of a primitive type, appears to fulfil a purpose recognizably like that of law in a civilized nation, is known as the 'taboo'. The word itself comes from Polynesia; but a similar institution is to be found in so many other primitive communities, that we are justified in regarding it as a normal stage of evolution. It is traceable not only amongst the Hawaiians and the Maoris, but in Madagascar, amongst the aborigines of Australia, the Malaysians, the Dyaks of Borneo, the primitive races of India, the ancient Jews, the Syrians, the Eskimos, and the Red Indians.

The 'taboo'

It has most of the characteristics of a primitive institution. It is not specialized ; it is neither exclusively religious, moral, or legal ; but it fulfils an undifferentiated function which afterwards influences all psychical laws. Its main effect, in spite of some modern protests, appears to be purely negative. It is to stamp as abhorrent the doing of certain acts, with the implication that the individual who does them will bring down, not merely on himself or herself, but on the community of which he or she is a member, a terrible blight usually described as a ' curse ', which may take any number of different forms—death, sickness, sterility, hunger. As to the taboo, or the author of the evils to be expected from breach of it, there is great vagueness, which is yet another trait of its primitive character. In practice it is pronounced by certain members of the group whose reputation, or *mana*, is great, and who enforce their pronouncements by magic rites. Some quite sympathetic observers, e.g. Mrs. Munday, who spent some years as the wife of a trooper in the North-West (afterwards the Royal Canadian) Mounted Police among the Innuits (Eskimos), but whose official position, as she herself confesses, made her feel it not quite ' proper ' to attend the séances at which the taboos were pronounced, declare of the ' antikoots ' or sorcerers of the Innuits, that " they are fooling the natives, and they know the natives are being fooled ".³ More competent observers are less severe in their criticism of mystery men and women of primitive communities. It is one of the special faculties of primitive Man, that he can, quite deliberately, work himself up into a state of excite-

ment, during which he experiences something very like inspiration, and that this inspiration may move him to denounce conduct for which, in his sober moments, he had formed a more or less rational dislike. In any case, if some of the primitive taboos still seem to us to be mere arbitrary anathemas, others, such as the bans on incest, shedding the blood of a woman, and parricide, have thoroughly justified themselves. Some even of the many apparently irrational food—and word—taboos may have had practical value. At least the existence of taboos had one very substantial effect. It drew the line, however arbitrarily, between right and wrong, and thus paved the way for a more scientific system in the future.

It is not difficult to understand how the system of taboos leads on to the next stage in legal development—the era of custom. The
Custom similarity of conduct established by the continued observance of taboos survives the disappearance of belief in the taboos themselves, which follows upon the increase of intelligence, and the gradual emergence of reason. This is usually accompanied by a marked improvement in material conditions ; the hunting life of the primitive group expands into the fuller, more occupied life of the pastoralist or herdsman, ultimately of the tiller of the soil and the simple craftsmen who learn to supply his mechanical needs. Which is the cause and which the effect, it is difficult to say ; probably they react on one another. Physical conditions have, doubtless, much to do with the progress of development. Where animals fit for domestica-

tion are abundant, the practice of collecting them for pleasure and, ultimately, profit, naturally springs up ; and each success stimulates the intelligence and leads to further progress. It seems almost certain that observation of the results of the mating and breeding of animals, such as cattle and sheep, leads to the substitution of the patriarchal family for the primitive totem-group, formed by the fancied influence of some beast or bird on its members, and, with the gradual development of tillage, the farming community with, ultimately, its fixed homesteads, for the wandering pastoral household.

But these changes gradually bring about an equally important change in the ethics of the group. The primitive influence of the taboo, with its mainly negative results, is succeeded by the positive element in custom, gradually acquired by the more varied life of the herdsman and the farmer. The taboos are not entirely forgotten ; they remain as the prohibitive influence. But to them are added the more active and positive injunctions of the ' dooms ', such as the *Weisthümer* of the folk moots which regulate the life of the agricultural village, and the Brehon judgments of the Book of Aicill which spoke the word to the Irish pastoral septs. This, the period of the *Leges Barbarorum*, is the subject-matter of the later works of Sir Henry Maine, *The Early History of Institutions* (1874) and *Dissertations on Early Law and Custom* (1883). The transition to the next stage in the evolution of law is studied with care in the earlier part of Professor Allen's suggestive work, *Law in the Making*.⁴

For we come now to the appearance on the scene of the State, the organ of the nation, or political society occupying a fixed territory, bound together by the tie of military allegiance to its ruler. At first the ruler, with his immediate followers, stands aloof from the mass of his subjects. He issues commands ; the student of legal history does not deny that many of the jurist's laws are true commands, he only denies the truth of the view of Hobbes and Austin that *all* such laws are commands. But the commands of the newly-established ruler are at first of a very limited kind, directed mainly towards the protection of his own immediate followers (such as the ' curfew ' and the ' presentment of Englishry '), the defence of his territory against attack,⁵ and the security of his revenues. For the rest, his subjects go on leading their lives in the old way, governed by their ancient customs. Only gradually does the influence of the nascent State extend itself to the affairs of common men—the farmer, the herdsman, the craftsman, the merchant—in the manner sketched in a previous chapter.* Once started, however, the movement goes on with increasing rapidity ; and more and more the action of the State affects the activities of its subjects. Quite naturally, as its scope extends, the State absorbs into its law more and more of the customs of its subjects. These it enforces by the irresistible pressure of its Courts of Justice and its police. When, by the aid of a representative Parliament, it has learned to know the needs and wishes of its subjects, expressed through their petitions or

* Chapter I, pp. 22–23.

cahiers, it avowedly initiates new laws. Henceforward, that particular form of law which we call 'statutory law' or 'legislation' begins to supersede the older form of customary law embodied in tradition, doom, or formal judicial decision, and, in many countries, appears to wipe it out altogether, by the process of codification. In English-speaking communities codification, in spite of earnest and distinguished advocacy, has found little favour, with the result that the historical method of jurisprudence can be applied to the laws of Anglo-Saxon communities with far less difficulty than to many other systems. For one object of codification is, undoubtedly, to render the appeal to History useless; it is a notorious fact that Bentham, the great advocate of codification in England, despised the study of History, which he described as "a collection of the absurdest animosities, the most useless persecutions" —a curious verdict for the countryman of Gibbon. But History has a way of making its critics look small; and the improvement of the methods of historical study since Bentham's day has enabled its students to pierce even the veil of codification, and thus to throw light on the cryptic language of the codifier.

3. COMPARISON

If we can fix the birth, or, at any rate, the re-birth, of the historical method in juristic studies by the appearance of Charles Darwin's epoch-making works, we can, with equal confidence, attribute the revival of the comparative method to the tragedy of the Great War of 1914-18. It may appear, at

first sight, strange to associate with an orgy of warfare a method which, above all things, assumes international intercourse. But the paradox is only superficial. In a world-war which is not mere anarchy, there must be allies; and, the more strenuous the struggle, the closer these allies are drawn together, and the more they get to know of each other's affairs. After the Great War of 1914-18, moreover, the condition of the vanquished required close examination, not entirely from disinterested motives, by their former opponents. In fact, the nations of the world found themselves, as a result of the war, far more closely intermixed with one another's affairs than ever before; and this result was intensified by the swift multiplication and improvement of the means of communication which followed it. International contacts of many kinds became more frequent, and, among them, contacts between legal systems and their respective exponents.

The noble example set by Montesquieu in the eighteenth century, in his famous work *L'Esprit des lois* (1748), in spite of the enthusiasm which it aroused among his contemporaries, was long in bearing practical fruit. For the period which followed the Peace of Westphalia (1648) and lasted until the end of the nineteenth century, was a period of great and growing nationalism, in which the tendency of each nation was to hold itself aloof from its neighbours, in suspicion and disdain, proud of its own peculiarities, unwilling to believe that it had anything to learn from the institutions of foreign countries. This state of affairs was not favourable to the

development of a method of study which implied a good deal of international intercourse. On the Continent of Europe, however, there was still a common basis for comparative study, in the wide prevalence, in various forms, of legal systems which owed much to Roman Law ; and the brilliant work of the *Savigny-Stiftung* in Germany, the foundation of which was stimulated by the War of Liberation against Napoleon, undoubtedly helped to keep the feeling in favour of the comparative method alive, even in the days of growing nationalism. For these efforts were expressed in a series of admirable editions of the ancient legal texts of the 'German' peoples, which, though primarily historical in their purpose, may have served as a link between the historical and the comparative methods, inasmuch as they naturally suggested comparisons between one stage of a legal system and another. Bodies like the French *Société de législation comparée*, the German *Verein für vergleichende Rechtswissenschaft*, and the British Society of Comparative Legislation, had an even more direct influence in that direction.

Still, it was not until after the war, at any rate in English-speaking countries, though the Quain Chair of Comparative Law in the University of London (University College) had, in the hands of Sir John Macdonell, become an important focus of cognate studies for some years before that date, that the comparative method bore substantial fruit. Since the war, however, there has been a real quickening of life, both in Great Britain and the United States, while the activities of the League of Nations, with its organ, the Permanent Court of International

Justice at The Hague, have greatly stimulated interest in comparative legal studies in Europe. For, though the Permanent Court deals only with questions arising between States, and is, therefore, guided primarily by the rules of International Law, yet, by the terms of its charter, where these fail to provide an adequate solution of a dispute, the Court is directed to take, as at least one of its guides, the general principles of law recognized by civilized nations.

A very striking proof of this interest was the foundation, in the year 1924, of the *Académie Internationale de Droit Comparé*, having its seat at The Hague, and meeting annually for the furtherance of comparative studies in law. The Academy, though strictly limited in numbers, includes representatives of every civilized nation, or at least every group of cognate nations, in the world, with the somewhat remarkable exception of India. It was singularly fortunate in securing, as its first President, the distinguished French jurist, M. André Weiss, for some time Vice-President of the Permanent Court, and, on his lamented death, Professor Antonio de Bustamante, one of the leading jurists of South America. So vigorous has been its progress, that it was able to organize, in the year 1931, a widely representative Congress, which was attended by eminent jurists, both theoretical and practical, from all civilized countries. The deliberations of that Congress, to which effect will be given by the Academy, are likely to have a powerful influence in the development of comparative legal studies.

**The
International
Academy**

Two specially hopeful tendencies may be noted in the present situation.

In the first place, Montesquieu's famous work, like that of its equally famous predecessor, the *De Jure Belli ac Pacis* of Grotius, and, to come to modern times, the work of the American jurist Professor J. H. Wigmore, *Panorama of the World's Legal Systems*, fail to bring out, with sufficient clearness, the importance, in a strictly comparative study, of observing unities of time. These eminent authors range over all known history for their examples and illustrations, somewhat regardless of differences in the stages of development of the institutions and rules which they discuss. The comparative jurist of the new school demands severely, that like shall be compared with like, that is to say, that the subject-matter for comparison shall be a perfectly definite institution—e.g. a bill of exchange—and that the comparison shall be between the legal form and effect of this institution in contemporary systems of law, or, at least, of systems in a similar stage of development. Such a method may be more prosaic than the magnificent scale on which Grotius and Montesquieu worked; but it is more likely to yield the results hoped for at the present day from the comparative method in juristic studies.

What are the chief of these results? They have been admirably summarized by Dr. Gutteridge, a distinguished exponent of the comparative method, in a paper read before the annual meeting of the Society of Public Teachers of Law in England and Wales in 1931.⁷ The first is that, though a general

unification of the laws of civilized nations is, probably, neither possible nor desirable, there are certain parts of many civilized systems of law which might, with advantage to all parties, be unified. These are, naturally, the parts which contain the rules and forms which are the common subjects of international intercourse. The bill of exchange, recently referred to, is an obvious example. Bills of lading, rules of navigation at sea, nationality and naturalization laws, are also suggested ; and, on some of these, jurists are at present at work. Obviously, no one nation can insist on other nations accepting its rules wholesale. The process of assimilation must begin by a careful study of the rules of all nations, and an honest attempt to harmonize them.

A second result which, it is hoped, will follow from a use of the comparative method is a greater familiarity and better understanding between the influential and active spirits of different nations. It is almost a truism, that the nations of the world are rapidly becoming, whether they like it or not, more dependent on one another for the maintenance of a tolerable world-order. Many admirable societies for the development of international intercourse already exist ; but, till recently, the juristic world was not conspicuously represented among them. Fortunately, that is being changed by the development of comparative studies in law. In addition to the formation of the International Academy, previously noted, the exchange of students of law among the universities and other law schools has sensibly developed since the war. England has, probably, received in this respect,

more than she has given ; and, though this fact may be flattering to her national pride, there are dangers in it for her. It is almost more important, for the future of peace in the world, that the youth of different countries should fraternize in their impressionable years than the seniors whose minds are already set.

Finally, in order that a student should practise the comparative method, he must be trained to use it. That the technique of comparative legal studies is, as yet, far from complete, must be admitted. Such tools of the trade as international dictionaries of legal terms, catalogues of law libraries in different countries, parallel arrangements of legal sources, and similar essential machinery, are still far from adequate ; though the efforts of the International Academy of Comparative Law, the Institut International de Co-opération Intellectuelle, and the Institut International de Droit Public are full of hope for the future. But the greatest need of all is, that universities and other centres of legal learning should make provision for the systematic teaching of the comparative method, and thus train up a body of jurists well equipped to pursue the fruitful prospects of comparative study in the future.

In conclusion, it may be asked, as was hinted at the beginning of this enquiry into the methods of Jurisprudence, is there such a thing as a special and separate critical method ? Bentham appears to have thought that there was ; and he proposed to give to it the name of 'deontology'. Austin

Is there a
'critical'
method ?

seems, though with hesitation, to have agreed with him⁸; but the treatment of this method by both these eminent jurists is far from satisfactory. Sometimes they appear to treat it as a branch of ethics, at others as an equivalent of the science of legislation, which is rather a matter for the statesman than the jurist. Perhaps the safest conclusion is, that the pursuit of the historical, and especially of the comparative methods of Jurisprudence, in itself involves, almost necessarily, critical conclusions; it being always remembered that the function of the critic is not merely to condemn, but to praise where praise is deserved. There is a good illustration of this truth in the admirable little comparative study of the judicial organizations of England, France, and Germany, recently published by Mr. R. C. K. Ensor,⁹ in which the working of each system is impartially surveyed, and contrasted with the working of the others. The reader is left to draw his own conclusions; but criticism is inevitably suggested. Again, in the application of the historical method—for example, in tracing the development of the concept of negligence, previously mentioned—the English student comes across the curious anomaly, that by English Law, no highway authority can be made liable for statutory non-feasance, i.e. mere omission, to a private plaintiff. Inevitably his critical faculties are aroused. Is there any sound reason for this anomaly? Ought it to be allowed to continue? Perhaps the best argument for declining to recognize the existence of a separate critical method of jurisprudence is the fact, that a jurist would find it difficult to pursue any serious critical study,

without either making use of the historical or the comparative method, or going outside his province as a jurist.

It is, probably, on some such lines as these that the so-called 'Sociological' method of Juris-

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prudence, suggested by, among others, Dean Roscoe Pound, of the Harvard Law School,¹⁰ would proceed. The comparison of the doctrines of the jurist with the social institutions which they are presumed to express in legal form, necessarily involves the use of the three accepted methods of Jurisprudence. If the function of the State's law is, as has been suggested, to harmonize the interests of the individual with the general good, its working should faithfully reflect the working of the social life of the community of which the State is an organ. If, as is sometimes suggested by eminent exponents of the so-called 'sociological school',¹¹ there is a conflict between the ideals of the jurist and the social reformer, that is a situation which must be handled, not by accusations of unreality on the one side and of revolutionary tendencies on the other, but by earnest and patient exchange of ideas between the upholders of the rival points of view. It is of supreme importance for the welfare of the nation, as of any other community, that the best brains of its members should pool their resources in its interest. And it is one of the happiest results derived from such an exchange of ideas, that it is often found, after patient discussion, that what appeared, at first sight, to be irreconcilable differences of ideals are merely misunderstandings of different points of view.

CHAPTER IV

SOURCES OF LAW

IF we regard Law as a force immanent in the universe, we shall, naturally, expect to find it manifesting itself in many ways and many shapes. In view of the poverty of language, and, it must be admitted, the somewhat careless practice of its users, it is not, perhaps, surprising to note a good deal of ambiguity in the employment of terms used to signify these various manifestations. Apparently, the root distinction should be between *Law* as the name of the force, and *laws* as the comprehensive name for the different manifestations of that force. This would be a simple and intelligible practice ; but there are difficulties in adhering to it, because the many groups into which these numerous manifestations fall require collective names. Thus, even if we confine our attention to the laws with which only the jurist is concerned, we require collective names for the national or territorial groups into which they fall, and, within those groups, to sub-groups formed to indicate distinctions of origin, form, and subject matter. For this purpose, the easiest and most obvious plan is to fall back on the singular of the term ; and so we speak of English Law, French Law, and so on, or again of Parliamentary Law, Customary Law, Administrative

Law, or again, of Statutory Law, Judiciary Law, and Textbook Law, or, as the French call it, '*doctrine*', or, once more, of Criminal Law, Property Law, and so on. This practice, again, inevitably leads to an attempt to distinguish the individual laws contained within each of these groups from the group itself; and for this purpose we coin such make-shifts as 'rules of law', which is again unfortunate, because a rule is rather the result of a law than itself a law. Finally, the use of the definite article 'the', in such phrases as "it is the law that", or "in England the law is that" (an individual attains his or her majority at twenty-one), gives rise to further confusion of terms. It is idle to urge the adoption of any orthodox system; the only hope is, that speakers and writers will be so far consistent in their use of terms, that their meanings will be clear.

It may be helpful, however, because it will prove to be the key of many difficulties, to point out, that most of these inconsistencies and ambiguities are due to the unperceived working of a second great force in the universe, to which the name '*evolution*' is commonly given. The essence of this force, or, at any rate, the chief way in which it manifests itself, is the production of species by differentiation or fissure from less highly organized origins. But this process is so gradual, both in the realm of physical nature and in the psychical world of institutions, that it is hardly perceived until some time after it has in fact taken place. Consequently, the terms necessary to distinguish a new species from its antecedent, and from other species akin to it, are always, so to speak, a little in arrear,

with the result that there are great overlapping and confusion in the use of such terms ; and many misunderstandings ensue from them. These are almost inevitable ; and, again, the only remedies appear to be, the exercise of greater care by the user of such terms on the one hand, and a critical watchfulness in the detection of fallacies by his hearer or reader on the other.

A good example of the snares set by ambiguities of language is to be found in the various meanings attached to the topics of this and the succeeding chapters, viz. the sources and forms of law. To a modern thinker, there is a clear distinction between the origin of a law and the shape assumed by that law. We should say, for example, that an Act of Parliament has its source or origin in the body known as Parliament, and that its form or shape is statutory or legislative. Yet it would not be unreasonable to describe the Act of Parliament itself as the ' source ' of the law prescribed by it ; and, in fact, this ambiguity has, in times past, given rise to a famous but somewhat unprofitable classification of the law of any given State into ' written and unwritten '. Of this a few words must be said ; because it is a convenient approach to a much more important controversy, with which we shall have to deal more fully.

The distinction between written and unwritten law was known to the civilized nations of the ancient world. The statement of it most familiar to modern students is found in the Institutes of Justinian, a textbook for students compiled by order of a Roman Emperor, and enjoying the

'Written' and
'unwritten'
law

unique privilege, for a textbook, of having legislative validity. The author, Tribonian, departing from his chief model, the *Commentaries* of Gaius, a distinguished jurist of the second century A.D., quotes from a hardly less famous but slightly later jurisconsult, Ulpian, and writes :

" Our law consists (*constat*) either of written or of non-written law, as was the case with the Greeks " (the Greek terms being νόμοι ἔγγραφοι, ἄγγραφοι). " Written law, is statute (*lex*), resolutions of the plebs (*plebiscita*), decrees of the senate (*senatus-consulta*), constitutions (*placita*) of the Princes, edicts of the magistrates, opinions (*responsa*) of experts." " Law which comes from unwritten sources is that which custom approves. For habitual practices (*diuturni mores*) approved by the consent of those using them are held for law (*legem imitantur*). " ¹

Now it will at once strike the reader that this is, in essence, an enumeration of sources or origins, rather than, as it professes to be, of forms. Doubtless the question whether he has or has not written evidence for an alleged law is important, both in degree and in kind, for the jurist and his client ; in degree, because of the greater certainty of the written than of the unwritten form, of kind, because the rules for the interpretation of a written document may, and frequently do, differ from those applying to merely oral testimony. But, in essence, the whole question is one of authority, or competence, not of evidence or form, i.e. in the words of Kant, " that which causes the manifold matter of the phenomenon to be perceived ".

This view is supported by the change in the basis of the distinction between ' written ' and ' unwritten ' law which made its appearance in modern times. In the days of Justinian, certainly in the

days of Ulpian, most 'writing', so far as public documents were concerned, took the form of inscriptions on tablets of stone or marble, though, doubtless the papyrus and, probably, the parchment roll, were used by private persons. With the great improvement in the manufacture of paper which occurred in Europe in the fourteenth century, the art of printing soon became a business proposition; and the printed book appeared as an ordinary tool of the learned and official worlds in the fifteenth. Well before that time, improvements in the art of writing had made the parchment roll a familiar means of recording Parliamentary statutes, decisions of the Courts, and royal letters and accounts; and even the proceedings in the petty manorial courts, and their 'customals', were recorded in writing.

Yet, when we turn to the passage in Blackstone's famous *Commentaries on the Laws of England* which corresponds to the above-quoted introductory passage in the Institutes of Justinian, we find a significant alteration in the classification. Instead of listing, under the head of written law, royal or magisterial orders and textbooks (the nearest equivalent of the *responsa prudentium*), Blackstone confines written law to "the statutes, acts, or edicts, made by the King's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled", while, under the head of unwritten law, he classes everything "which is not made by the supreme legislature directly".² Even more significant is the fact, that Blackstone was himself struck by the apparent absurdity of classing as unwritten law the

contents of the Plea Rolls, the Year Books, the later Law Reports, textbooks such as those of Bracton and Coke, and the records of the Civil (Roman) and Canon Laws ; and that the explanation of the anomaly which he gives is plainly inadequate. For, he says of these,

" their original institution and authority are not set down in writing as Acts of Parliament are,* but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom ".²

Precisely, it is a question of authority, not of form ; and the question had ceased to be of importance, because all kinds of laws with which the jurist is concerned were, in Blackstone's day as in ours, to be found in writing, or rather, in print. The classification into written and unwritten law has, in fact, become impossible in modern times.

Curiously enough, it was succeeded, in England at least, by another classification which, after a reign of nearly a century, has recently become the subject of acute controversy.

John Austin, the founder of the English school of analytical jurists which dominated English legal thinking in the nineteenth century, maintained with emphasis that the only source of juristic law was the sovereign power in a political society, or State, and, consequently, that the only basis of classification of such laws from the standpoint of their origin

**The Austinian
classification**

* Presumably every document (including an Act of Parliament) is composed in the author's mind before being written. But one would have thought that, e.g. Plea Rolls, were as directly written as Acts of Parliament.

was that which divided them into (a) laws directly set, and (b) laws not directly set, by the sovereign power. Austin's work, as it appeared in print, is so confused and fragmentary, that it is somewhat difficult to pin him down to a precise thesis. But, taken in conjunction with his lengthy and discursive parentheses, we may fairly regard a passage which appears, in substantially the same form, more than once in his treatise, *The Province of Jurisprudence Determined*, as a presentation of his views on this point. According to him, every law 'properly so called' (by which he means every law in the jurist's sense) is "a command set by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme, obliging generally to acts of forbearances of a class".³ This definition Austin derived ultimately from Hobbes ("Law is to every man that which the Commonwealth has commanded him"),⁴ through Blackstone ("A rule of civil conduct, prescribed by the supreme power in a State, commanding what is right, and prohibiting what is wrong"),⁵ and Bentham ("The will to which it (a law) gives expression either emanates from the supreme authority in the State, or has that same authority for its support").⁶ But Austin's uncompromising and dogmatic insistence upon the rigid application of his theory impressed itself on the thinking minds of his day; and, as he was substantially followed by eminent jurists such as Hearn, Markby, and Holland, his definition deserves examination.

With part of it we have already dealt. We have suggested that the requirement of a command is

by no means an essential of a juristic law ; though it is, undoubtedly, to be implied at least, if not actually stated, in many, if not most, of such laws.* We have also seen reason to question the necessity for an element of generality in a law. We now come to the element with which the name of Austin is specially associated, viz. the element of 'sovereignty', which is included in his definition of a law 'properly so called' as being set by a 'sovereign person or body'.

As a matter of fact, Austin's own definition of **Sovereignty** sovereignty is much more reasonable and moderate than those of some of his followers. He says :

" If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." "

Now there are really only two criticisms to make of this definition. The first and most obvious is, that the term political society is not defined by it. The words 'a given society' would include any kind of a society, whereas a political society (or nation) has more than one peculiarity which distinguishes it from all other kinds of society, as has

* It is, as a matter of fact, quite interesting to notice how very few modern laws are put bluntly in the form of commands. Even criminal statutes share this feature. But there the command is, of course, clearly implied. If the legislature says that anyone who is found in another's garden after dark, having house-breaking or other suspicious articles about him, shall on conviction be liable to imprisonment, that is a pretty clear command, though the imperative form is not used,

been before explained,* and as Austin himself in other parts of his work has also explained. The second is not so obvious. It is to be found in the fact that Austin's words clearly show that he requires that there shall be, in every political society, or nation, one or more sovereign or supreme persons, and a much larger number of purely subordinate persons. And there can be little doubt that this was Austin's view ; for in another passage he says : " An independent political society is divisible into two portions ; namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject." ^s And he goes on to point out, that the old classical division of governments into monarchies, aristocracies, and democracies, is based on the proportion which the members in each such part of the society bear to those in the other. But it is clear that, whatever may be the case with monarchies of the autocratic type, such as the Tsardom in Russia before the Great War, in both aristocracies and democracies there is no possibility of drawing a sharp line between the supreme and the purely subordinate members of the political society. For, despite certain limited privileges or immunities which are or may be accorded to the members of the alleged sovereign bodies in such communities, they are, for the most part, as individuals, subject to the laws which, *ex hypothesi*, are made by the sovereign body, and cannot, therefore, be said to be purely sovereign themselves.

The comparatively modest demands of Austin are carried much further by some of his successors ;

* Chapter I, pp. 10-16.

and their claims are subjected to a careful examination by Sir John Salmond, in an Appendix to his work on Jurisprudence.⁹ He finds the three fundamental propositions of the theory of sovereignty to be (a) that sovereignty is essential in every State, (b) that it is indivisible, (c) that it is illimitable—thus, in fact, making sovereignty in jurisprudence equivalent to omnipotence in theology. The value of the first proposition, with which Sir John Salmond himself appears to agree, may be estimated from the argument by which it is supported, viz. that there must be supreme power in every political society, for otherwise all power would be subordinate. This argument seems to be far from convincing. We might as well argue that there must be blue in the world, for otherwise everything would be red. Is it not just possible that political power may be divided between two or more bodies in such a way that none is supreme over or subordinate to the others? The wisdom of such an arrangement may be questioned; but it does not seem impossible that it should be made. In fact, something very like it is made in every federal constitution; for the essence of a true federation is, that the political power is shared between the federal government and the governments of the federated units. Neither can, without breaking the law, invade the sphere of the other. And if it be said that, in such cases, the sovereign power resides in the federal government and the governments of the units collectively, one can only reply that no machinery is provided in most federal constitutions for the joint action of such bodies; and that, in the rare cases in which

such machinery exists, it is created for the sole purpose of amending the federal constitution, and cannot, therefore, be regarded as illimitable.

But the objections to the theory of sovereignty are not merely that it is illogical and untrue, but that it is the result of historical accident, unnecessary to a sound theory of jurisprudence, and, though this objection is not, perhaps, strictly within the province of the jurist, mischievous in practice.

In the first place, it may be noted that, until the end of the Middle Ages, the word 'sovereign' (*supremus* or *summus*) was used quite generally, in England at any rate, simply as equivalent to 'head' or highest person in a community. Thus, in the petitions addressed to the Good Parliament of 1376, we find the abbots or priors of religious houses described as 'sovereigns'; and in the Year Books a similar title is applied to the Heads of the colleges of Oxford and Cambridge. Quite naturally, the King, as the highest person in the nation, was spoken of as 'sovereign'; though, until the reign of Elizabeth, the usual form of address to the monarch seems to have been 'Your Grace', not 'Your Majesty'.

But it will be remembered that the end of the Middle Ages in Europe was marked by the religious revolt against the Papacy, which, in Protestant countries, meant, amongst other things, a victory of the lay over the ecclesiastical authority, and, consequently, a vast increase in the power of the former. The maxim: *cujus regio ejus religio* marked yet another step in the process which had converted the King from a mere military overlord

History of
the theory of
sovereignty

into an institution, 'the Crown', which was gradually becoming the representative of the national life in most, if not all of its aspects. At the same time, alongside of the increasing scope of the royal authority, there was manifesting itself a counter-movement towards an organizing of the Crown's authority into departments, or branches, which, in the future, was further to convert it from a personal into a constitutional monarchy. It seems to have been this development which brought into existence the word 'State', to stand for the complex of government machinery (including, naturally, the King himself, the 'Head of the State'). Of course the old personal flavour of the monarchy was very persistent, and, in fact, survives to this day. In England, Parliament itself is, by the theory of the Constitution, only one of the many councils of the King; the national revenue is the King's revenue; the Judges are the King's Judges; the Ministers are the King's Ministers. But, gradually, people began to regard the King and his various advisers and officials, as an abstraction or entity, which could have a policy, interests, and character, apart from the personal idiosyncracies of the individuals who, for the time being, held actual power; and to this abstraction or entity the name 'State', not without some competition from the rival word 'Commonwealth' (rendered unpopular by the Civil War), was ultimately given. Thus, for example, the King's political secretaries became His Majesty's Principal Secretaries 'of State'; and, during the interregnum, the Privy Council was replaced by the Council 'of State'. It is, admittedly, difficult for the layman to keep

clear in his mind the distinction between the concrete community of the nation and the abstract complex of institutions called 'the State'; but much confusion would be avoided if writers and orators would not write and speak of 'members of the State' when they really mean (if they have any definite meaning at all) members of the nation of which the State is the supreme organ.

It is another remarkable fact, that, just at the time when the word 'State' was making its way into the political language of England, another word, also destined to a great future, the word 'Imperial', should have made its appearance there. But the coincidence is not accidental. England had never, even before the Reformation, been a very obedient subject of either the Holy Catholic (Roman) Church, or the Holy Roman Empire which was its secular counterpart. Nevertheless, she had, undoubtedly, allowed Holy Church to exercise over her a good deal of authority which we should now call political; and, even towards the Holy Roman Emperor, at least in her Continental policy, she was bound to pay some deference. But the religious revolt of the sixteenth century had, long before Bodin and Grotius had formulated their theories of 'sovereignty', led English statesmen to claim England as an 'Imperial State', i.e. a State which was itself an Empire, entirely independent of a certain mighty potentate who, lord of Spain, Austria, Swabia, and the Netherlands, not merely claimed to be the successor of the Roman Emperors who had once ruled Western Europe, but had actually made himself very unpleasant over a certain royal divorce. The 'Im-

perial' title of the English State afterwards came in very handy when England became a great colonial power; but, originally, it was merely an assertion of independence as regarded a foreign potentate.

Put these two elements together—unquestionable authority in internal affairs, due to the rapidly extending and never expressly defined powers of the King in Parliament, a bold assertion of independence of all external authority, clerical or lay—and you have all that is necessary for a reasonable theory of State sovereignty. Sir Frederick Pollock rightly points out, that the prominent part which Parliament had been made by Henry VIII to take in his revolutionary changes, caused Sir Thomas Smith, one of the earliest 'Secretaries of State', to formulate, in the year 1565, not for the King alone, but for the King in Parliament, "the earliest definite statement of the modern doctrine" (of sovereignty). But it is not a little remarkable, that, in the passage quoted by Sir Frederick Pollock,¹⁰ the words 'sovereign' or 'sovereignty' do not appear; nor anything whatever about essentiality, indivisibility, or illimitability. Sir Thomas Smith speaks only of "the most high and absolute power of the realm of England . . . which hath the power of the whole realm".

Is anything more necessary for a sound theory of jurisprudence? If a nation does in fact maintain in power a 'State' or body of governmental institutions which can effectively produce, adjudicate upon alleged breaches of, and compel the observance of, laws intended to control the conduct of its mem-

Is 'sovereignty' necessary?

bers, what more can be desired as a working basis for the jurist, theoretical or practical? Why may not, for example, the laws of Ceylon be just as good laws, in the juristic sense, as those of France or Italy, though Ceylon is not a sovereign State? Or the laws of Quebec, which is a true State, satisfying all the tests of Stateship, though again it is not a sovereign State? These examples have been deliberately chosen, because the laws of Ceylon and Quebec cannot be said, except by a strained use of language, to be the creation of the sovereign power which, at the present day in the case of Ceylon, and, till lately, in the case of Quebec, held sway over them. For, according to the liberal theory of the British Empire, colonies acquired by conquest retain their former laws, unless they are deliberately altered by imperial authority. It is sufficient to say that these laws are enforced in the daily life of the communities to which they are attributed. Why drag in omnipotence?

Perhaps, as has been suggested, the third objection to the theory of sovereignty is not a purely juristic objection. But, after all, jurisprudence and political science have so much in common, that

Is it desirable? a special responsibility for a theory which is, above all things, in origin, a juristic theory, attaches to jurisprudence in this matter. And so a jurist may be forgiven for suggesting that, whatever may have been the case in the past, the theory of sovereignty seems, at the present day, to be one of the greatest stumbling-blocks in the path of international progress. Its appearance in the international world is due pre-eminently to two men, Bodin and Grotius. Bodin's

motives may well be suspect. Those of Grotius were entirely honourable, and were at first crowned with brilliant success. Realizing that the religious schism of the sixteenth century had rendered it impossible for Protestant States to accept any longer the shadowy authority of the Pope and Emperor as arbiter in their disputes, and sickened by the horrors of the Thirty Years War, Grotius set himself to discover a new source of authority, which should supplement the inadequate influence of Divine Law and the conventional rules established by treaties. This new source, the Law of Nature, which he defines as the ' dictate of right reason ', i.e. the natural outcome of the social and rational qualities of mankind, Grotius sought to build up out of the international practices of past ages, especially the practices of that ancient world to which the Renaissance of learning had recently given a greatly enhanced reputation. In order to make his thesis acceptable, he attempted to placate jealousies by releasing all States from any external human authority, that is, in accordance with the accepted views of the day, regarding them as being, so far as their intercourse with one another was concerned, in a ' natural ' or pre-political condition. And for that very reason, he urged, they were bound by the only law suitable for such a condition, viz. the Law of Nature, the ' dictate of right reason '.

Grotius' success was, at first, admittedly, brilliant. His *De Jure Belli ac Pacis* is, judged by its practical influence, one of the world's great books. It is the foundation of modern international law ; and, for nearly three hundred years, it produced at least some mitigation of the evils which resulted

from the almost incessant wars of medieval Europe. But the theory on which it was founded was, in fact, a toleration of anarchy ; and, in due time, it collapsed, with the results which are painfully obvious. It is hardly too much to say that, ever since the Great War, the world has been struggling to escape from the theory of sovereignty in international affairs—from its jealousies, its rivalries, its preposterous pretensions, and its apprehensions—and to build up out of the ruins left by the war, a more wholesome theory of international society. With quite unconscious irony, Austin actually criticizes Grotius for having, in his famous definition of sovereignty, omitted to require that the subjects of the alleged sovereign must be as meekly submissive to him (the sovereign) as he is savagely indifferent to the authority of his fellow sovereigns.¹¹ This is almost like blaming a conqueror who has massacred all the warriors among his defeated foes for not exterminating also their women and children. But perhaps the most effective condemnation of the theory of sovereignty, as expounded by English writers, is the withering conclusion of Sir Frederick Pollock, that it is “a generalization from the ‘omnipotence’ of the British Parliament, an attribute which has been the offspring of our peculiar history, and may quite possibly suffer some considerable change in times not far distant”.¹² In other words, the error of Austin and his followers was, that they attempted to generalize from a single particular.

With the bogey of ‘sovereignty’ out of the way, the topic of the sources of law need give us very

little trouble. In any highly organized State, laws issue from, or appeal for their authority to, various persons, bodies, and influences. Thus, in England, we have Acts of Parliament, Orders in Council, Orders of Ministers, Royal Proclamations, Municipal and other By-laws, and rules dependent on the Common Law, the 'immemorial custom of the realm'. In France, despite the existence of her Codes, we have enactments of the Chambers (*lois*), Presidential decrees, with or without the advice of the Conseil d'État (*règlements d'administration publique*), Ministerial Orders (*arrêtés*), Prefectoral Orders (*arrêtés réglementaires*), Judicial decisions (*arrêts* or *jugements*), Municipal Orders (*arrêtés communales*), and expert opinion (*doctrine*). Similar conditions are to be found in other countries of a similar degree of civilization. These conditions naturally give rise to questions of much interest, both to theoretical jurists and practitioners. The former are interested in them as part of the law-making machine, and study the advantages and disadvantages, from a juristic standpoint, of different types of such organizations. What, for example, is the result of a supreme law-making body like Parliament delegating a substantial part of its legislative authority to Ministerial departments? What is the juristic result of the control over municipal legislation (by-laws) by the central government as exercised in England, compared with the corresponding control in France and other Continental countries? Is it or is it not desirable, again from the standpoint of an efficient legal system, that local legislation should be linked with a local judicature? These and many similar prob-

lems arise for the theorist out of the investigation of the sources of the laws.

The practitioner is interested from another point of view. With the exceptions of British Acts of Parliament and Continental Codes, practically all kinds of law issue from sources of limited authority. Consequently, the practitioner, in dealing with the laws which issue from them, is always faced with what is called in England the 'doctrine of *ultra vires*', i.e. the doctrine that each source must confine itself, in issuing its laws, within the scope of its authority. The doctrine of *ultra vires* is, doubtless, interpreted differently in different countries; but in all civilized States it presents important problems, because it extends, not merely to legislative and similar powers, but to executive and administrative acts, and to judicial organization. The rules which govern it form, in fact, a large part of that branch of every civilized system of law which is called, in England, Constitutional Law; the remainder of Constitutional Law being concerned with regulating the relations between the State and its officials on the one hand and the private citizen on the other. Even in this part of Constitutional Law, questions of *ultra vires* constantly arise, as for instance in the famous 'General Warrant' cases in the England of the eighteenth century, where the question really was, whether a Secretary of State had exceeded his authority in directing the forcible search of a citizen's house by means of a warrant directed to the sheriff, in which the citizen in question was not named.

For these reasons it will be seen, that the question of the sources of the various laws which are

found in a legal system is a question of considerable importance. Perhaps of even greater importance, however, both to the theoretical jurist and the practitioner, is the connected question of the forms assumed by such laws. To this question we now turn.

CHAPTER V

FORMS OF LAW

IF we adopt the definition of Kant, that form is “that which causes the manifold matter of the phenomenon to be perceived”, we shall probably think that the word *fons* (e.g. *fontes Juris Romani*), commonly used by Continental writers to signify the earliest records of a law, not very happy; and, indeed, it is constantly, in juristic discussions, giving rise to misunderstandings. For, closely as documentary records are involved with the matter which they record, they are but accidentals; and it is quite possible that the progress of physical science may, at no distant date, supersede them by far superior evidence. What is really vital in the form of a law is that it should enable the minds of the persons to whom it is directed to interpret the law in the appropriate manner. Accordingly, we must seek in our examination of the forms of juristic laws some classification which will correspond with differences of interpretation.

Now an observation of the contents of modern legal systems seems to show that a law may assume one of three forms, and that the methods of interpretation suited to these forms differ considerably. The forms are (1) statutory, (2) judiciary, and (3) literary.

The statutory form is the most modern of all, and is, in the opinion of some reformers, the only satisfactory form. Its distinguishing features are that it is an avowed exercise of authority, expressed in words which are intended to be literally interpreted and obeyed, applicable, in principle, only to future cases but to all of those which shall come within its terms. It is true that not a few statutes profess to be merely declarations of existing law,¹ e.g. so called consolidating and codifying statutes in English Law. But, in essence, even these statutes are really law-creating or originating; because they substitute a new form of words for the old, and thereby, almost inevitably, alter the obligations imposed by the older law. It is true, also, that some statutes are *ex post facto*, in that they penalize past acts and omissions, or, more frequently, validate and wipe out past breaches of the law. But by general opinion such legislation is only permissible in very urgent cases, e.g. where a marriage or a series of marriages, believed in all good faith by the parties to them to be valid, turn out, owing to some technical flaw, or to some fraud by a third party, to be invalid, and must be validated, *nunc pro tunc*, if the interests of the children born of them are to be preserved. Where the object is to relieve from penalties incurred by an innocent or excusable breach of the law, it is far better to resort to the type known as an Act of Indemnity, which, while frankly admitting the offence, relieves the offender from the penal consequences of it.

It must, of course, be remembered that while, as explained in the last chapter, statutes may be of

varying degrees of authority, this fact does not affect the question of form. A by-law of Little Peddlington is just as much a statute as the most weighty Act of Parliament dealing with the balance of the Constitution. The test of authority in each case is usually provided by that branch of a legal system known as Constitutional Law ; and, in most cases of statutory law, is fairly easy to apply. In fact, the author was at one time inclined to think that the simplicity of the validity test was an essential feature of statutory as contrasted with other forms of law. But reflection on the difficult problems of *ultra vires* raised by so-called ' prerogative ' Orders in Council in England and the ' decree ' powers of the French and German Presidents, has caused him to modify this opinion.

Naturally, each legal system will have its own rules for the interpretation of statutes ; and we cannot pretend even to summarize these. But it may be useful to enumerate, for the benefit of English readers, a few of the leading rules of English Law on the subject.

1. Unless there are overwhelming reasons to the contrary, the words of a statute are to be read in their ordinary, or ' dictionary ' sense, save where the statute itself expressly * or by irresistible implication, indicates another meaning. As a matter of fact, a copy of the New Oxford Dictionary has become an almost essential feature of the libraries of most of the English higher tribunals, for the purpose of assisting them in the interpretation of statutes.

* Many English statutes contain an ' interpretation clause '. These clauses are usually among the less happy efforts of draftsmanship. They are less defining than enumerating.

2. This ordinary meaning of the words of a statute having been ascertained, effect is to be given to it. This is, at any rate in English Law, the cardinal rule for the interpretation of statutes ; and consideration of extraneous circumstances is not allowed to interfere with it, except as indicated later on. More particularly, if the enactment of the statute has been preceded by public discussion, e.g. in the House of Commons, it is not permissible for the Court to turn even to the official records of the debates to draw from them aid for the interpretation of its clauses. This rule has often been criticized by laymen ; but a little thought will reveal its wisdom. For, even assuming that the records of the debates are complete, it is impossible for the Court to know which speeches (if any) influenced either House in its actual votes, or in what direction ;* while a prolonged discussion of Parliamentary speeches in Court would not only increase the length and consequent expense of trials of cases, but might lead to the importation of a political atmosphere into the precincts of justice.

3. The literal interpretation of the words of a statute does not, however, require a slavish adherence to the dictionary interpretation of every single word or phrase. The wording of the statute as a whole, including the title, preamble (or introductory matter), and, it seems, now, even the side-notes in Acts of Parliament, must be considered ; and, particularly, what are called ' general words ',

* It is not entirely a cynical view to take, that speeches of the supporters of a measure frequently influence the House to reject it.

or words capable of a very wide interpretation if taken literally, may be restrained by reference to the context. Thus a sweeping clause referring to "all other articles whatsoever" may be interpreted to mean only articles of the same genus or species as those expressly dealt with by the statute. This is known as the *ejusdem generis* rule, and would probably prevent a clause in a Railway Act professing to deal with the transit of perishable goods, being extended to cover timber or ironmongery.

4. Where, moreover, a literal interpretation of the words of a statute would produce a result manifestly inconsistent with the tenor of the statute as a whole, or so ambiguous, or so shocking to the sense of justice, as to convince the Court that they were not intended to be taken in their literal sense, they may be interpreted according to the *sententia*, rather than the *literæ* of the statute, or, as it is sometimes put, logically rather than grammatically. But it is to be observed, that even this divergence from the main rule of statutory interpretation, is strictly limited to ascertaining the intention of the legislature. If that once be clear, then, however it may offend the Court's views of expediency, wisdom, or even common sense, if the words used do accurately represent the intention of the legislature, they must be applied; unless, of course, the statute is invalid as being *ultra vires*.

5. As a guide to the ascertainment of the *sententia* of a statute, an old writer of repute has suggested that the Court should consider: "the old law, the mischief, and the remedy". The advice is sound, and is, in fact, adopted in appropri-

ate cases by the English Courts. Whatever may be the case with more enthusiastic legislative bodies, the overworked Parliament at Westminster is rarely inclined to undertake the labour of legislation unless there is a real grievance which has been persistently forced upon its attention by the occurrence of a genuine 'mischief'. Consequently, it should not be difficult for the trained mind of a judge to discover, from an examination of the 'old law', i.e. the law in force at the time of the passing of a statute (including, of course, the relevant rules of the Common or non-statutory law), the provisions of that law which gave rise to a 'mischief', and thus to secure valuable guidance as to the 'remedy' which Parliament intended to enact. The reasoning hardly applies, perhaps, with so much force to the numerous statutes of a type which has come into existence since the advice was given, such as, for example, the Orders of the Ministry of Health or the Board of Agriculture and Fisheries. For the 'mischiefs' with which many of these deal are so technical and obscure as to escape the public eye; and these statutes, unlike Acts of Parliament, rarely, if ever, condescend to state them.

6. As a further guide to the *sententia* of the legislature, the older books lay down the rule that "penal (or disabling) statutes are to be construed strictly, enabling statutes liberally". This rule is occasionally appealed to with success to enable a person accused of a criminal offence to escape condemnation, on the ground that the statute does not expressly penalize the conduct alleged against him; and it has even been extended so far as to enable

the citizen to escape the meshes of a taxation statute. There was, at one time, a good deal to be said for such a rule in the days of a savage criminal law and arbitrary taxation. But, now that indulgence to accused persons has gone to what some consider to be extreme lengths, while unconstitutional taxation has become a thing of the past, its force is a good deal abated, and it might really almost be regarded as a mere re-statement of the rule of evidence, so striking a feature of English Law, that every accused person is deemed to be innocent till he is proved guilty. There is, moreover, another consideration to be borne in mind. A statute which is penal as regards A may be remedial as regards B ; and to construe it laxly might seriously harm B. Thus, for example, a law imposing a penalty on an agent who accepts a secret commission from a third party to influence the conduct of his principal's business, is really as much for the protection of principals as for the punishment of agents who accept bribes ; and to hesitate unreasonably to apply it might seriously injure the former. Also, the fact that the less one citizen has to pay in taxes the more others have to pay, should not be absent from the mind of the judge who is trying a revenue case.

7. Conversely, the rule which is occasionally quoted as an appendix to that just discussed, viz. that statutes against fraud should be construed liberally, should not be made an excuse for twisting what is, perhaps, mere innocent or doubtful misrepresentation, into fraud, which implies a definite intent to deceive.

8. Finally, it is a rule of English law which is

often criticized, that a statute, unlike other forms of law, does not lose its effect by mere lapse of time or non-observance, but can only be repealed by a formal act of the authority which enacted it or some superior authority. As a matter of fact, in spite of many Statute Law Revision Acts, there are on the English Statute Book, a number of venerable enactments, the very existence of which has been forgotten, but which are occasionally unearthed by some antiquary with a purpose of his own to serve. The origin of the rule is, doubtless, the jealousy of Parliament, in the days of its struggle with the Crown, of any attempt to interfere with its peculiar province of legislation. It has little application to the newer forms of statutory law, which do not proceed, at any rate directly, from Parliament, and which, in fact, are issued by that very authority against which the rule was originally directed, i.e. the Crown, or Executive.

Indeed, it is clear that there are dangers in the existence of the rule. In the year 1540, Parliament passed an Act ² prohibiting any alienation of land by a person who, though he claimed to be owner, was, in fact, not in possession of it. The Act, not the first of its kind, was entirely wholesome when it was passed, being aimed at the practice, so prevalent in the later Middle Ages, of buying up doubtful titles, and then enforcing them with the aid of chicane, bribery, and, quite probably, violence. As society gradually became more peaceful, and the administration of justice more impartial and effective, the statute dropped out of sight. It remained, however, on the statute-book

for three centuries and a half, being discovered, almost by accident, by the framers of the Land Transfer Act of 1897,³ who promptly persuaded Parliament to repeal it. For at least a hundred years before 1897, conveyances of land had been made freely by landowners out of possession ; and, if the statute of 1540 had been put in force, hundreds, perhaps thousands, of them could have been prosecuted or sued for ' Maintenance ', as the conduct prohibited by the statute was called, while an equal number of conveyances would have been held void, and the titles dependent on them upset.

Nevertheless, no Court of Justice in England would venture to disregard the rule—at least openly ; and there is a case for preserving it. Statutes which have really become obsolete, i.e. by general consent inapplicable to existing conditions, can be, and are, repealed by Statute Law Revision Acts which, at frequent intervals, rake over the dust-heap of old statutes and repeal those which have become meaningless. On the other hand, certain very old statutes are actually in full vigour at the present day, such as, for example, the *Quia Emptores* Act of 1290,⁴ which forbids (or is held to forbid) the creation of a new fee simple estate out of an old one, and the famous Treason Act of 1351, commonly called the Statute of Treasons.⁵ It is open to any member of Parliament to propose the repeal of any Act which he deems to be dangerous and antiquated. But it would, probably, be often found, that there is far more support in public opinion for the retention of such statutes on the Statute Book, even though they are but rarely enforced, than ardent reformers believe.

The very efficiency of others may be the reason that they have faded from the public memory. They may have succeeded in stamping out the offences against which they were directed ; but a repeal of them might cause such offences to revive. At the same time, most jurists would deplore the scandal of a solemn Act of Parliament being ostentatiously defied by evil-doers ; and some of them would be inclined to doubt whether such an Act could properly be called a law at all. But the last is a point which must be reserved until we discuss the theory of the legal sanction.

The judiciary form of law is of peculiar importance in England and in countries, such as the United States of America, the larger part of the British overseas Dominions, and, to some extent, British India, which have either taken over a good deal of English Law or followed the model of judicial organization closely connected with it. But it is gaining considerably, one might almost say rapidly, in France, where it is known (to the confusion of the English student) as *jurisprudence*, and in Germany, where it goes by the name of *Fall-Recht* or *Gerichtliches Recht*. This is a really remarkable fact. For the legal systems of France and Germany have not only been built upon a plan wholly different from the English—briefly, by deduction from certain philosophical principles, drawn mainly from a study of Roman Law ; but it is fairly clear that the framers of some, at least, of their codes were anxious to reduce the functions of their judicial interpreters

to a minimum. Still, though the customary element in French and German Law may be stronger than is usually assumed,* there remains in neither system, both being codified systems, anything like the opportunity for judiciary law that there is in uncoded systems of law, such as the English.

For judiciary law is, above all things, a form suited—one might almost say essential—for the expression of that part of a legal system which has its origin in custom. As we have previously seen,† the customary is the second stage in the normal evolution of the laws of a civilized country; and while, in some countries, it has been apparently superseded entirely by the third, or legislative stage, in others, such as the English and systems derived from it, this third stage has only partly succeeded in superseding the second. Consequently, judiciary law plays a far larger part in these latter systems than in the former. It is, however, to be noted, that judiciary law is by no means exclusively devoted to the expression of custom. For, as has been also pointed out, the interpretation of statutory law is not always so easy as its admirers would have us believe; and, in fact, in the English and cognate systems, a large part of the judiciary law consists of interpretations of statutes, while, presumably, in countries with codified systems, it consists mainly, if not entirely, of such interpretations.

* On the eve of the Revolution, France was still largely a country of *droit coutumier*, a good deal of which reappeared in the *Code civil* (Napoléon).

† Chapter III, pp. 56-7.

The key to the importance of judiciary law is to be found in the doctrine of *precedent*, or *stare decisis*. By the theory of precedent, as understood in English-speaking countries, a decision by a competent Court of Justice upon a disputed point of law becomes, not merely a guide, but an authority, to be followed by all Courts of co-ordinate or inferior jurisdiction administering the same system, until it has been overruled by a Court of superior jurisdiction or by a statute of superior authority, e.g. an Act of Parliament, or, possibly, until circumstances have so changed, that it is regarded as being no longer applicable. For, unlike statutory law, judiciary law, at any rate according to the English view, may become obsolete without formal repeal.

But this apparently simple doctrine is by no means easy to work in practice. For it is not the habit of a Court of Justice, at any rate in English-speaking countries, to formulate exactly the legal principles which it believes itself to be illustrating in giving its decision. The English type of mind shrinks instinctively from generalizations; and nowhere is this fact more evident than in the language of judicial decisions. An English Court of Justice will emphasize at every opportunity that its function is, in every case, simply to do justice according to law between the litigants before it; and its view of the law is, consequently, to be discovered only by a comparison of the facts in the case with the conclusion arrived at by the Court on the merits of the litigants. But also, in almost every case, at any rate, every reported case,

the Court expresses, at greater or less length, the reasons which have led it to its conclusion ; and it is this process of reasoning (the *ratio decidendi*, as it is called) which is the vital matter of the precedent. A bare decision : " A is right, B is wrong ", would be of little value as a precedent ; for it would leave the public guessing as to the rules of law which had led the Court to its conclusions. This practice of giving its reasons in open court, practised almost universally in England for centuries, which aroused the enthusiastic admiration of Montesquieu on his visit to England in the eighteenth century, though he expressed his admiration in terms which have, perhaps, rather misled his countrymen,* is the shell within which is to be discovered the kernel of judiciary law. But the process of piercing the shell and arriving at the kernel requires some explanation. It has recently been made the subject of careful study by Mr. Justice Cardozo, of the Supreme Court Bench of the United States, in his work entitled *The Nature of the Judicial Process*, and in shorter, but acute and suggestive form, by Professor Goodhart in his essay on *Determining the Ratio Decidendi of a Case*.⁶ The author, whilst deferring to the greater authority of these eminent writers, may be permitted briefly to state his own view of the process.

Every rule of law with which the jurist, as such, is concerned, has to be applied to the persons and circumstances contemplated by it. If the rule is expressed in statutory form, this is, or should be,

* Montesquieu spoke of English judicial decisions as being always *motivés*. But, to a Frenchman, a *motif* is a statement of principle, to which English Judges rarely commit themselves.

a comparatively simple process, inasmuch as the statute, if properly framed, indicates these persons and circumstances with care. Still, as we have said, even statutes sometimes leave much to be desired in this respect. The classical example in England is the famous Statute of Frauds, of the year 1677.⁷ Upon the interpretation of a single section (No. 4) of this statute, there have been hundreds of reported decisions, which have rendered a simple perusal of the section an entirely inadequate preparation for the understanding of its effect. But, of course, the understanding of these decisions is immensely facilitated by the fact that, behind them all, lie the *ipsissima verba* of the statute.

With a decision upon a customary law, which is not embodied in any definite form such as a statute, the process is much more difficult. Here the conditions of application of the rule (as we may call the persons and circumstances involved) are complicated by the vagueness of the rule itself, which, if it has any form at all, is that of a statement of facts. Consequently, in addition to the necessity of discovering the persons and circumstances to whom and in which the rule applies, we have to discover the rule itself from a consideration of the facts in which it is embodied. Thus, for example, if, in a case of alleged trespass, the counsel of one of the litigants appeals to a reported decision in favour of his argument, he has to show, that the facts of his client's case are on 'all fours' not merely with those of the decision, but also with the facts which the Court which rendered that decision had in its mind as the type to which the facts on which it

based that decision conformed. It is impossible to go here into any lengthy examination of the nature of custom ; but it may be briefly described as a continuing course of conduct, which, by the acquiescence or express approval (though not in statutory form) of the community practising it, has come to be regarded as fixing a rule or norm of conduct for the members of the community. To discuss further the various forms which social approval takes, or the fascinating subject of the origin of custom, would take us too far afield. That is the province of the psychologist or the sociologist, rather than of the jurist.

The persons and circumstances necessary to be apprehended if the meaning of a precedent is to be understood, are compendiously described as the ' material facts ' of the case ; because it is on these that the judicial reasoning which resulted in the decision was based. How are these to be ascertained ? Obviously we cannot ourselves investigate them ; we are dependent for them on the printed report of the proceedings appearing in one of the publications which the Courts will accept as *primâ facie* accurate. Clearly these reports cannot state all the facts of a case—physical conditions forbid. But Professor Goodhart has wisely warned us against assuming that all even of the *reported* facts of a case are material, or that the summary of them usually prefixed to the report is conclusive. Reporters are skilled lawyers ; but they are not judges. The only facts which, again be it said, are material, for precedent purposes, are the facts which influenced the Court in its conclusions ; and the only safe guide to these facts is the mention of

them by the Court itself in its judgment. Of course, on the one hand, the Court will probably mention a considerable number of facts which obviously are not relevant to the *ratio decidendi*, such as, for example, the names of the parties, the place where the transaction in question took place, the amount of money involved ; and, unless the Court itself describes these as material, they may be left out of account. On the other hand, all facts which the Court, expressly or by implication, mentions as material, must be regarded as an essential part of its decision ; and, unless the facts in the case of the advocate who appeals to that decision as a precedent are similar, the decision will not help him. If his opponent claims the authority of another, apparently conflicting, decision as a precedent in favour of *his* view, the position is described as being a 'competition of opposite analogies' ; and, in theory, the method of choosing between them is clear, though it may be far from easy in practice. On one side range the material facts of the case in dispute against the material facts of Precedent A ; on the other, range them against those of Precedent B. The precedent which has the greater number of material facts identical with, or similar to, those of the case in dispute, is the precedent to be followed in that case.

This last rule leads naturally to what is the real difficulty in the application of judiciary law. For it seldom happens in practice that the decision of a pending case can be settled by reference to a single precedent ; for the good reason that a well-advised litigant would be reluctant to incur almost

certain loss when he knew that there was a practical certainty of his defeat by the quotation of a binding decision clearly against his point of view. Almost the only occasions of such a kind occur when, the interests at stake being great, a litigant is prepared to accept defeat in a court of first instance, with the hope of getting the adverse precedent reversed, or, rather, overruled, by appeal to a court of higher jurisdiction than that which pronounced it. Thus, the King's Bench Division of the High Court in England might find itself compelled by the doctrine of precedent to decide against A, because of a previous High Court decision which was against him. But A, by appealing to the Court of Appeal, might get that decision reversed; because the Court of Appeal might think the previous decision wrong, and, not being bound by it, might overrule it, i.e. decline to regard it as fatal to A's claim. The result of such a course would be, not merely that it would win A's case, but that all future cases involving the same or similar facts would also be decided according to the view of the Court of Appeal; unless and until some other litigant persuaded a still higher tribunal, e.g. the House of Lords, to overrule the decision of the Court of Appeal.

Unfortunately for litigants, however, the comparatively simple fate of having their cases decided by decisions directly in point does not often occur. A far more frequent state of affairs is, that many alleged precedents may be quoted at the trial of a case, none of them, admittedly, directly in point, but all claimed as indicating the view which the Courts pronouncing them would have taken had

the facts of the case under trial been before them. Obviously this is a somewhat speculative line of argument, involving a good deal of risk of over-subtlety and specious casuistry. But in some of the precedents quoted, the individual judges may have uttered what are known as *dicta* or *obiter dicta*, i.e. opinions as to what views they would have taken had the material facts in their case been otherwise ; and some of these hypotheses may fit the case under discussion. Such *dicta* are not binding on later tribunals ; for " a case is an authority (only) for what it decides ". Nevertheless, in order to maintain the fiction, for it is in some instances little more, that the law which the Courts expound is a fixed and settled thing, a later Court will shrink from differing from even a hypothetical opinion of one of its predecessors. So important is this doctrine considered to be, that in England the highest Court of appeal, the House of Lords, now takes the view that it should not overrule its own previous decisions, even though it sees reason to think them wrong ; and so such decisions can only be altered by Act of Parliament. It is believed, however, that other supreme tribunals, e.g. the *Cour de Cassation* in France and the Supreme Court of the United States, do not share this view.

Evidently this process of ascertaining the ' balance of authority ' is highly technical and difficult ; and it is hardly possible to assume that correct results are always attained by it. Clearly decisions which are of equal formal authority are not all of equal value as precedents. The reputations

**Comparative
values of
precedents**

of the judges who decided and the advocates who argued a particular case must, in spite of the decorous impartiality of their successors, influence the minds of the judges who have to decide on its precedent value. The fact that the judges in a 'collegiate' court, i.e. a Court composed of more than one judge, disagreed in their reasons, much more if they differed in their conclusions, must detract from the value of a decision as a precedent. The fact that a decision has not been 'followed', i.e. has not influenced the decision of later cases, is against it; partly because it seems unfair to penalize the litigant whose advisers have honestly followed the trend of judicial opinion, partly because to ignore a decision seems to argue disapproval of it by later judicial opinion. On the one hand, age gives an added weight to decisions on certain branches of the law, e.g. the Law of Real Property; because the building of that law was undertaken centuries ago, and, in spite of all changes in the superstructure, the foundations still remain. On the other hand, decisions on copyright and patent law are the better for being modern; for they deal with laws which are, comparatively speaking, of yesterday, and which have hardly yet attained full growth. The character of the report or reports of a case also affects its value for precedent purposes; for they may differ, or be unintelligible, or clearly incorrect. And a reference to the official record of the case, though it may correct actual mistakes in the conclusions of the judgment, may not supply the deficiencies in the report.

It is not surprising that a form of law requiring

for its application a process so complicated and technical should have met with severe criticisms from reformers ; some being undoubtedly of weight. To Bentham it was a *bête noir* ; and he roundly stigmatized it as ' not law '.⁸ That criticism recalls the story of the passer-by who found a friend in the stocks, and enquired the offence for which he was put there. Being informed, he replied : " But they *can't* put you in the stocks for that." Ever since the thirteenth century at least, when Bracton wrote the first systematic treatise on English Law, judges and textbook writers alike have adopted the doctrine of judicial precedent ; and the law has been administered on the basis of it. Sir Samuel Romilly, Bentham's disciple, objected to it that the community had no control over its making ; but that objection is, in the first place, untrue, for Parliament can, and, in fact, not infrequently does, overrule judicial decisions, and, in the second, it is only an objection to the method of appointing judges. Another objection is, that it is made in haste, which is again largely untrue ; for the decisions which are really important as precedents are usually made by highly expert persons, familiar with the system into which their decisions are to dovetail, and often with considerable deliberation. Decisions made in the hurry of jury trials are seldom quoted as precedents. The objection that judiciary law is *ex post facto* loses much of its weight if it be remembered that, always in theory and to a large extent in fact, judicial decisions only give effect to principles which have long been known to be binding.

Merits and
defects of
judiciary law

On the other hand, judiciary law is undoubtedly open to certain objections. It is, unquestionably, a bulky and difficult form of law to handle ; and its existence tends to complicate its rival form, the statutory, and increase its bulk and obscurity. What a skilled draftsman could say in six lines may necessitate sixty decisions, with all their costs and anxiety, to lay down ; and the desire of the legislature to anticipate the risk of what it considers to be judicial evasion of its statutes sometimes causes those statutes to assume a length and complexity which would otherwise be unnecessary. It requires an expert to disentangle a rule of law from the mass of decisions upon which it rests for support. Even the chief merit of judiciary law, its flexibility, i.e. its adaptation to minute differences of circumstances, is counterbalanced by the disadvantage that it multiplies variations of a simple principle, thus doing away, to a large extent, with that generality and uniformity which, though they may not be essentials of law, are at any rate features of good law. Perhaps the greatest merit of judiciary law is, that it acts as the best possible preparation for statute law. Statutes like the English Sale of Goods Act,¹⁰ Bills of Exchange Act,¹¹ and Partnership Act,¹² which are, for the most part, simple codifications of judicial decisions, are models of statute law ; for they combine the merits of both forms, while discarding the weaknesses of each.

Literary (or textbook) law is a very old feature of legal history. To say nothing of the ancient Law Books of the East (which lie beyond our ken),

we get, in Western Europe, from the tenth century to the fourteenth, an important group of books, the precise origins of which are difficult to discover, but which, undoubtedly, were accepted by the tribunals of their respective countries as authoritative expressions of law for various periods. There is no evidence that these books were ever issued, or even formally approved, by any 'sovereign' person or body; most of them are anonymous, while of the others the names of the authors are more than doubtful. Among the anonymous class are the *Ulfssjötslög* of Iceland (tenth century), the *Rectitudines Singularum Personarum* (eleventh century) and the *Leges Edwardi Confessoris* and the *Quadripartitus* (twelfth century) of England, the *Haflidaskra* of Iceland, also of the twelfth century, the *Regiam Majestatem* (Scotland), the *Deutschen-spiegel*, the *Schwaben-spiegel*, and the *Summa Pro-sarum Dictaminis* (Germany), the *Sjöllandske Love* (Denmark), the *Grágás* (Iceland), all of the thirteenth century, the *Quoniam Attachiamenta* (Scotland) and the *Kleines Kaiserrecht* (Germany) of the fourteenth, and many others. Of the avowedly 'nominate' books, such as the treatise on English Law attributed to Glanvil, of the twelfth century, the *Sachsen-spiegel* of Eike von Repgowe for thirteenth-century Saxony, and the *Style de du Breuil* (France) of the fourteenth century, the authorship is, to say the least, doubtful.

It is very characteristic of a primitive age that men, usually rough and prone to quarrel, should consent to have their quarrels settled by an appeal to a parchment roll containing little black marks, without troubling

Literary law

themselves to enquire the origin of the authority to which they were submitting. But there is much surviving in modern times to prevent us denying the fact, proved by much evidence. There are still millions of people who believe all that they see in print or on the screen, or hear on the 'wireless'. Why should the argument of authority for "It is written" be any less powerful than the argument for "I have seen it in print" or "I heard it on the wireless"? In one way, the anonymity of the medieval textbook favoured its acceptance. Many a man will bow before the authority of an unknown judge, whose pugnacity would be aroused by any attempt of a known individual to impose his authority.

It is, probably, a fact, that most of the treatises under discussion were based upon sources derived from something like definite authority, such as the assembled folk at a moot, or the practice of some primitive tribunal, or, perhaps, most of all, from the known practices of the community as summed up by an individual of superior intelligence. The process by which the later *coutumiers* of what is now France were drawn up at a slightly later period is well known. The royal officials presented a *projet* or draft, based upon previous enquiries and official knowledge, to an assembly which was representative in a popular if not a technical sense, being more like the 'primary' of an American election than a House of Commons elected on strictly regular lines. This was the famous *enquête par tourbe*, a process by which, in the later days of the French monarchy, most of the local customs of the *pays coutumiers* were definitely recorded. The manorial customs which, all over Western Europe,

once governed the rights of millions of the peasantry, and the *Stadt-rechte* of Germany, the *statuts* or *établissements* of the French towns, were of a similar type. 'Glanvil's' book, the *Style de du Breuil*, the *Weisthümer* collected by Jakob Grimm from old German sources, the *Plaids de l'Échevinage de Reims*, the *Olim* of the Parlement of Paris, and the *Parloir aux Bourgeois* of the Merchants' Court at Paris, were almost certainly of the second type; while the influence exercised, even so late as the seventeenth century, on the councils of Europe by the textbook of a Dutch refugee, Hugo Grotius, with certainly no trace of 'sovereign' authority about him, should make us hesitate to disbelieve the evidence for the influence exercised by literary authority in days when the critical spirit was imperfectly developed.

In a later and more critical age, especially in countries which have felt the influence of the 'analytical' school, the reputation, or, rather the authority, of the literary form of law has, admittedly, dwindled. While in England the pronouncements of the early 'classics', Bracton, Littleton, Coke, as to the law of their own day, are still generally accepted by the Courts as conclusive, this respect is rarely shown to any textbook of later date than the seventeenth century, save in cases where, as in the instance of the 'Conflict of Laws', a subject has for the first time been scientifically treated by an author such as Dicey or Westlake. The critical spirit of Frederic William Maitland, who brought his vast historical knowledge to bear upon some of the *dicta* of Littleton and Coke, was gravely rebuked by an eminent

practitioner, Mr. Challis, in the closing years of the nineteenth century, as not quite consistent with forensic comity. But, for the most part, though learned judges on the Bench often refer with respect to the works of modern authors, they regard them, in essence, as persuasive only, not authoritative. The decision of a single judge of the High Court outweighs the pronouncement of the most eminent textbook writer, unless the latter can show that the judge had clearly overlooked a previous decision which the industry of the textbook writer has discovered.

The practice of Continental courts is said to be different. In French judicial proceedings, *doctrine*, in German, *Wissenschaft*, is reputed to carry greater weight than legal literature in England. The obvious explanation is, that the strength of the doctrine of judicial precedent in English-speaking countries militates powerfully against the recognition of literary law by their tribunals; while the comparative weakness of that doctrine on the Continent allows it fuller play there. It will be interesting to see whether the tendency of Continental Courts to give greater weight to precedent, previously noted, will be accompanied by a decrease of respect for literary law.

It is, perhaps, a somewhat delicate situation for
 a textbook writer to occupy, who
 attempts to discuss the comparative
 merits of judiciary and literary law.

But, though the persons chiefly interested in defending judiciary law are, by custom, precluded from replying to criticism, yet there are many other persons well qualified to defend the system, and

a respectful criticism, especially if it be on the whole favourable, may, perhaps, be permitted.

There can be little doubt that the judge has one great advantage over the textbook writer, in that he delivers his opinion under the immediate responsibility for doing justice to human beings whose reputations, livelihoods, peace of mind, or even lives, may depend upon his decision. Such a responsibility is calculated to bring out the best qualities of any mind—scrupulous care to ascertain the facts, watchfulness to see that no unfair advantage is taken of either party, complete impartiality. When the responsibility falls upon a person with the long experience of practice, forensic and judicial, and the high moral qualities, which characterize English Judges, it is not surprising that the long roll of their judgments, recorded in the reports, should reveal a very high standard both of moral integrity and intellectual ability. The privileged position and high reputation which the Judges of England have enjoyed for nearly two centuries and a half have been fully earned.* But it must be remembered, that not all judges are appointed in the same manner, or on the same conditions, as the English. Broadly speaking, Continental judges are not recruited from the outstanding figures in the ranks of a fiercely competitive profession, which tests its members' ability and character to the full. The lower ranks of the judicial hierarchy in France and Germany, for example, are filled by young men fresh from a somewhat academic and restricted training, who work their way up the ladder of official promotion, partly by seniority, partly by influence. As a rule,

though not invariably, the rank and salary of an English judge remain as they were at his first appointment. On the other hand, he is, in substance, irremovable except for actual crime ; and his salary cannot be reduced by anything short of an Act of Parliament. Consequently, he has little to fear or hope from the dispensers of Government patronage or from personal popularity. This is a very different position from that, for example, of many American judges, who are chosen by popular election for a limited period, and, if they desire re-election, must keep their eyes fixed on the weather-cock of public opinion.

Another striking advantage, somewhat strangely overlooked by writers on Jurisprudence, of the judiciary over both the statutory and the literary forms of law, is its extraordinary vividness, and, consequently, its educative effect. For one person who can understand and grasp the meaning of a general statement such as those which appear in statutes and textbooks, there are at least a thousand to whom the meaning of such a statement is brought home with clearness by the report of an actual case which illustrates it. Compare, for example, the definition of larceny as it appears in the Larceny Act, or the ' explanation ' of it in a treatise on Criminal Law, with a newspaper report of the appearance of John —, ' described as of no occupation ', before the magistrates on a ' smash and grab ' raid. And, of course, the difference is still greater for the audience at the hearing of the case. The two first forms are, simply, broadcasting of a not very effective kind ; the last is a vivid stage-drama. It has all the merits of the Oriental

parable, with the additional advantage of being true to fact.

In the matter of haste in forming conclusions, which, as we have seen, has been made a ground of criticism of judiciary law, there is, probably, nothing in which literary law has the advantage. The judge takes as much time as he thinks needful for his work ; the textbook writer does the same.

Nevertheless, literary law may have three advantages over judiciary law, at any rate as the latter exists in English-speaking countries.

The first is, that, by the very nature of judiciary law, a judge cannot depart from a precedent which, by the rules of the game, is binding upon him, even if he thinks it wrong ; while the textbook writer is under no such limitation. The textbook writer may demonstrate by a process of sound reasoning that a decision is founded on a misapprehension of the law or on false logic, or is inconsistent with general principles ; and, in countries in which literary law is recognized as binding, may, in effect, get rid of it. In the year 1867, the Exchequer Chamber in England, which corresponds to the now Court of Appeal, decided that a railway company was not liable to a traveller who had been wrongfully arrested by one of the company's station-masters, acting in the course of his ordinary duties, and, as he believed, in the interests of the company. Had the defendant been an individual, there can be no reasonable doubt that he would have been held liable for the wrongful act of his employee, done in the course of the latter's employment. But the Court came to the extraordinary conclusion that, as the company itself

would have been committing a wrongful act had it personally (how, is not stated) arrested the plaintiff, it could not be liable because its employee had done so.¹³ To which doctrine the natural answer is, that that is, in the vast majority of cases, exactly the position of the individual employer, who cannot be made responsible for the act of his employee unless the act, if done by himself, would have been wrongful. The decision has been steadily condemned by textbook writers for fifty years; and it was ignored in the famous *Taff Vale* case of 1901, in which the funds of a Trade Union were held liable for tortious acts alleged to have been done by the authority of the officials of the Union. Yet it was acted on frequently by the Courts during that period, until at last, in a case which went to the House of Lords,¹⁴ on whom, of course, the decision of the Exchequer Chamber was not binding, the decision was, in substance, over-ruled.

A second advantage which a textbook writer may have is, that he may be able to formulate a general principle, which will cover a multitude of cases, while a judge may only decide the actual case before him, and any expression of opinion not necessary to the decision of that particular case is, as has been said, a *dictum* only, and not binding on his successors. Doubtless, the extreme advocates of induction will boldly defend this rule; but it is submitted that they take a too limited view of the inductive method of reasoning. The great scientist does not regard his many successful experiments merely as isolated triumphs. He tries earnestly to co-ordinate them into a principle which shall illustrate the working of a law. The practitioner who

regards precedents merely as a matter of memory is reducing his great profession to the level of a rule-of-thumb industry.

Finally, judiciary law, unlike its rival, is not amenable to criticism. It can, of course, be overruled by Parliamentary legislation ; but it is too specialist a study for the ordinary member of Parliament to undertake to revise it. Occasionally a very startling decision arouses public feeling and is, perhaps, after a long struggle, overruled by legislation. Such instances were comparatively numerous in the early years of the present century. But the process is slow and uncertain. It took four hundred years, perhaps more, to destroy the famous Rule in *Shelley's Case*,¹⁵ though all thinking persons realized that it was a mere survival from a state of society which had long since passed away. This example proves that even the criticism of experts may beat in vain against the solid rock of judicial precedent. Again, it is true that the unsound judicial decision can, if it is not a decision of the highest appellate tribunal, be reversed on appeal, or overruled by the subsequent decision of a higher Court. But the latter process may not take place for many years ; and the unsound decision may, in the meanwhile, have worked much harm. Moreover, in either event, the process, often a costly one, will have been carried out at the expense of an unfortunate litigant, who has relied upon an authoritative statement of the law. The textbook enjoys no such immunity. If its conclusions are unsound, or if they cease to be applicable, the remedy is simple. People cease to read it ; it has no longer any influence on the administration of the law.

CHAPTER VI

THE LEGAL SANCTION

IT has been previously observed,* that all psychical laws involve the attachment of some inducement to observe them ; because such laws are addressed to the human will, which has the choice of revolt. It is sometimes even argued, that physical laws involve similar inducements—that, for example, the unpleasant consequences following indulgence in an orgy of spirit-drinking are in the nature of a ‘ sanction ’. But this suggestion is due to confusion of thought. The intemperate man has not broken the physical law by indulging in strong drink ; on the contrary, he has fulfilled it. It is the religious, the moral, and, possibly, the State’s law that he has broken ; and, as the so-called ‘ sanction ’ is not imposed by any of these laws, it is illogical to treat a purely physical consequence as if it were. Probably, the suggestion is a survival of the anthropomorphic view of the universe which was once prevalent.

A more difficult question arises when we ask ourselves whether a ‘ sanction ’ must necessarily be an evil, or, in other words, whether the law of the jurist operates through fear only. On the one hand, there can be little doubt that, historically speaking, the concept of penalty is much older than

* Chapter II, pp. 34-6.

that of reward. The 'taboo', the earliest form of law, operated entirely through fear of the 'curse', with its attendant vague but very real terrors. Even the reputation for 'piety' of the patriarchal man who honourably observed the ancestral custom was probably less conspicuous and effective than the outlawry or other communal vengeance which followed the breach of it. On the other hand, we reminded ourselves at an earlier stage of this work,* that the practice of offering rewards to 'common informers' was well known quite recently in English Law—is, in fact, not yet extinct. And, though we may say that these are not 'sanctions', because it is not to the will of the offender that they are addressed (for the law can hardly be said to require a person to act the part of common informer), yet it is quite easy to note examples in very modern law, in which reward is undoubtedly offered as an inducement to obey the law, or, at least, to obtain results desired by the lawgiver. Section 8 of the English Rating and Valuation Act, 1925, authorizes a rating authority to allow a discount of a limited amount from rates paid by certain persons with exceptional promptness; and there can be no question that this provision is due to a desire on the part of the legislature to encourage prompt payments by the ratepayer, not to a desire to penalize the rating authority. It may be said, of course, that the ratepayer is not compelled to make prompt payment, and that compulsion is an essential element in all State law. But this is only another way of saying that, in fact, the State, in enforcing its law, has hitherto made very little

* Chapter II, p. 38.

use of the sanction of reward, and that the sooner it mends its ways the better. Certainly the expounders both of religious laws and of moral laws make abundant use of the sanction of reward ; the former with a wealth and prodigality which have a powerful effect on many minds. On the whole, the view that a legal sanction can only take the form of a penalty appears to be a survival of the now discredited claim that 'all laws are commands', and to the fact, unfortunate but quite intelligible historically, that human lawgivers have found, or think that they have found, that penalties are more effective in securing observance of their laws than rewards. The discretionary distribution of 'honours' by the State does not come directly into the question ; because that is an administrative, not a legislative act.

For practical purposes, therefore, the jurist is concerned almost wholly with sanctions which are, in themselves, evils, that is to say, are
Nature of the legal sanction intended to deter the wills of the persons affected by them, from breaking the law which affixes the sanction, 'by the fear of suffering.

These evils are mostly of a material kind. This follows from the fact that the *ultima ratio* of the State, viz. physical force, can, so far as its direct action is concerned, only operate materially. But it must not be forgotten that, both in earlier stages and, to a less extent, even at the present day, the jurists' law has not infrequently added a non-material supplement to its sanctions. The old Greek sanction of *αἴψλα*, the Roman *infamia*, the burial of the suicide at the cross-roads, the hanging

in chains, the exposure in the pillory and stocks, the quite modern rule of English law which deprives the convict and the bankrupt, at least for a time, of their political rights, and the French *publicité de la condamnation*, are of this kind. Still, again, the typical legal sanction is material, not psychical, just as it is deterrent, rather than persuasive.

The material sanction has, in times past, taken many forms—deprivation of life, imprisonment, mutilation, scourging and other forms of torture, hard labour, deprivation (whole or partial) of property, compulsory restoration of land or goods, payment of pecuniary damages. It is a black story, brightened only by the great reforms which have been made in the later chapters, largely through the labours of a series of Italian penologists, from Beccaria to Lombroso. On the rival claims of jurist and psychologist to deal with the problem of punishment, we cannot here speak ; it is sufficient to refer to an interesting suggestion by a writer to whose work we have before alluded,¹ who proposes that, in the case of convictions for serious crimes, the sentence shall not be pronounced by the Judge, but be determined (either freely or within prescribed limits) by a Board comprised mainly of physicians and psychologists. The obvious objection to this proposal, from the standpoint of its advocates, is, that it still leaves the determination of the accused's guilt or innocence to the Judge and jury ; whereas the physician and the psychologist claim to be heard on that point before it is too late. We can here, however, deal only with the juristic aspects of the legal sanction.

Viewed from this standpoint, sanctions fall into two great classes—penal and remedial. The latter, on whatever principle they are based, have, for their object, the indemnification of the person or persons who have suffered from a breach of the law, at the expense of the offender ; the former, though it may have that object, also aims at inflicting on the offender suffering which has some other object, e.g. atonement, revenge, public example, deterrence of repetition, or, in the latest phase, reformation of the offender. These latter sanctions are the peculiar province of what is known in England as the Criminal Law, in France as the *Droit pénal*, in Germany as *Straf-recht*. But it should be borne in mind, that this is, to a certain extent, a matter of historical accident, as we shall see. In ‘codified’ countries, which have broken somewhat violently with their past in the matter of legal development, the two classes of sanctions may be applied in the same proceedings, e.g. where the *partie civile* is allowed to appear in a French criminal prosecution and claim the award of compensatory damages for the loss suffered by him from the crime. Even in England, where the line between criminal and civil proceedings is very sharply drawn, this not infrequently happens, as where the Court orders the restoration to the prosecutor of goods stolen from him by the thief who has just been convicted and sentenced. Conversely, the survival in English Law of the ‘penal action’, i.e. the action brought by a private person to obtain a penalty for a breach of Public Law, shows that the penal sanction is not, even in the English system, confined to Criminal

**Sanctions,
penal and
remedial**

Law. It is largely a matter of accident. Still, the penalty or punishment is so closely allied with Criminal Law as to make it convenient to consider the two together.

There can be little doubt, as has been said, that the penalty derives, ultimately, from the ancient 'taboo'. The vagueness of that primitive sanction has disappeared from the precise characteristics of the Criminal Law of the modern State—the vagueness both of the evil and of the source of that evil. Instead of the wrath of the Unseen Powers, which may express itself in countless unexpected forms, we have the precise sentence of the State's official: hanging by the neck, seven years' penal servitude, fine of two hundred pounds, and the like. But the root principle is the same. The offender has outraged the feelings of the community, the modern version of the anger of the Unseen Powers. He must be made to suffer *pain* (ποῖνῃ); though each age may give a different answer to the question: Why?

There can be very little doubt that the primitive answer would be: to appease the Power whose dictates have been outraged, and thereby to avert the danger to the community of an outburst of his wrath. Barbarous as the notion seems to us, it still, incredible as it may sound, lingers in certain circles. It is the principle working in the long and blood-stained history of the cult of sacrifice, which, as its name implies, is a reconciliation with the Unseen Powers. The proper victim is the offender; but if, for any reason, he cannot be secured, some one or something else must suffer, so that atonement may be made. The author has himself heard

a respectable beneficed clergyman maintain that it was ethically just that children should suffer for the sins of their parents, because only thereby could the anger of the Deity be appeased.

The next stage is the vengeance of the community, now substituted for the wrath of the offended Powers. As the rational element in the human mind increases, minor ill-deeds, such as petty assaults and injuries to property, or breaches of the village custom, are visited by the appropriate *wergild* or pecuniary fine; but there are always some offences so gross, that they seem to be attacks on the whole community—such things as betrayal to the enemy, dealings in witchcraft and sorcery, slaying of a sleeping victim. These are the ‘bootless’ (*bôt-léas*) offences, i.e. offences which cannot be bought off with money, but which the community itself undertakes to punish, either by the process of the blood-feud, or by some communal remedy like the ‘hue and cry’, followed by banishment and outlawry.

It is at this stage that the nascent State steps in. Communal vengeance, like the modern ‘Lynch law’ which is a survival of it, has two great drawbacks; one, that it produces a condition of violence and disorder, the other that it frequently selects the wrong victim. The latter fact may not appeal much at first to the new type of authority; but the former is, as we have seen, inconsistent with one of the oldest tasks of the State, the maintenance of internal order. Hence we find, at an early stage in the history of the State, that the King, as its representative, takes over the pursuit (‘prosecution’) of the criminal, and the execution

of punishment. Incidentally, the State will hold some kind of an enquiry to see that it has got the actual culprit. Hence the origin of true criminal procedure—the indictment of the Grand Jury, replacing the old ‘hue and cry’, the gradually developing science of proof or evidence, the solemn pronouncement of the verdict, judgment, and sentence. The offences in question go by different names. In the Frankish Empire they were known as the *acht Bannfalle*, in the West-Gothic law they are called *orbotæmal* or *nithingswaerk*, in pre-conquest England, ‘the King’s rights’, in Normandy, the *placida spadæ*, the Anglo-Norman ‘pleas of the Crown’. The characteristic of them all is, that they are breaches of the King’s peace, and, therefore, personal insults to him. In the words of the old English form of indictment, which were used for centuries, they were “against the peace of our Sovereign Lord the King, his Crown, and his Dignity”. After the State had developed legislative activity, the number of crimes, i.e. offences against the King’s Peace, multiplied; but, unfortunately, the irrational taking over by the State of the old popular remedy of death or outlawry, with forfeiture of the offender’s land and goods which naturally followed, besides causing vast suffering, obscured the important fact, that the transfer to the State of the administration of criminal justice had introduced a new element into the theory of the penal sanction.

The primary purpose of the State in taking over the prosecution of offenders was not, as we have said, vengeance, but the more rational and enlightened purpose of prevention or deterrence. It was

really as an offender against internal order that the offender was prosecuted ; for the State exists to preserve order, not to satisfy vengeance. Doubtless, so far as the offender actually executed was concerned, this object was attained ; but, after a long struggle, through the growth of humanitarian sentiment in the eighteenth and early nineteenth centuries, doubt began to grow as to whether the universal death-penalty was really sound as a preventive, especially of the worst type of crime. If a man knew that, of whatever crime he was convicted, he was liable to be hanged, he might endeavour to cover up a crime of quite minor moral and social importance, by murdering a potential witness. Moreover, the growth of public opinion might induce juries, in countries where trial by jury prevailed, to bring in perverse verdicts to prevent what they deemed to be judicial murder ; or, where there was no jury, might stamp the Court as an engine of bloodthirsty tyranny. In any case, it did not appear that the universal death-sentence achieved the desired end, viz. the diminution of serious crime. A far more efficient deterrent was found in the establishment of new and improved police forces ; and, either from that cause, or from the substitution, in a large number of cases, of milder punishments for the once universal death-penalty, which occurred in the first half of the nineteenth century in Western Europe generally, the statistics of serious crime have since shown a marked improvement.

Lastly, as the result of the further growth in sensitiveness of the public conscience, and the increased interest taken in psychological studies,

we have the doctrine, that the object of criminal punishment should be the reformation of the offender. If this object succeeds, its benefits will probably not be limited to the offenders actually reformed by it ; for it is a well-known fact, that criminal tendencies are infectious unless they can be sterilized. Thus, in reality, the new ideal of reforming the actual offender may be the shortest way to the achievement of the older ideal of deterrence.

It may, perhaps, sound somewhat cynical to suggest, that the origin of the modern ideal of reformation of the offender as the object of the criminal penalty, is to be found in somewhat material considerations. But the fact remains that, when the colonization of America by Western Europe was seriously undertaken in the seventeenth century, it was found, long before the appearance of modern humanitarian feelings, that one of the most effective methods of recruitment was the offer to condemned criminals of a free passage to the new lands, as an alternative to execution or imprisonment. The practice was fully established, both in France and England, long before the passing of the first formal ' transportation ' Act in the latter country in the year 1717.² The works of Defoe, the great English novelist and journalist of the early eighteenth century, abound in references to the subject ; and it is noteworthy that while, doubtless, there were great scandals in connection with the practice, Defoe, who had ardent popular sympathies, on the whole regarded it favourably. In fact, many of the ex-convicts returned to their countries of origin with comfort-

able fortunes ; and it was widely known that still more were doing well in their new homes. This, as has been said, was long before the great outburst of humanitarian feeling aroused by the teachings of Voltaire and J.-J. Rousseau ; but, of course, it helped to prepare the way for the application of such sentiments to the operations of the Criminal Law, and to establish the ideal, that one, at least, of the objects of punishment should be the reform of the offender. If, said the philosophers of the rational eighteenth century, instead of hanging a poor wretch or keeping him in a filthy prison at great expense, and leaving his wife and children to be supported by the rates, you can send the whole family to a country where they will be welcomed and treated as valuable citizens, why not do it ? Incidentally, also, the startling contrast between the fates of the offender in his old and his new countries would, it may be supposed, provoke reflections on the part played by social and economic environment in the manufacture of criminals, and thus tend further to moderate the savage character of penal sanctions.

Turning now from the penal to the remedial sanction, we find that this is a much younger growth in the development of law. There seems to be little, if any, trace of it in primitive conditions ; and what evidence we have for the administration of justice by patriarchal or communal tribunals seems to show that private offences, i.e. offences against the custom which have, for their primary object and effect, injury to one's neighbour rather than

**Remedial
sanctions**

the community at large, are treated by the same kind of sanctions (though much milder) as public offences. The *wergild* of the Anglo-Saxon laws, the *faidus* of the old *Leges Barbarorum* of the Continent, is not a serious attempt to reduce what a modern English lawyer would call 'unliquidated damages' to a pecuniary standard. This may, no doubt, be due largely to the practical difficulty that there was, as yet, very little money in circulation, and no convenient machinery, such as the later institution of the jury, for making the assessment in the individual case. There is, certainly, a rough attempt to apply the *lex talionis*—a sort of tariff varying with the physical extent of the injury. But there is also, quite obviously, an attempt to measure the offence by the insult to authority which it implies, rather than by a precise pecuniary standard, e.g. to steal a cow from a bishop or noble was a much more costly affair than to steal a cow of similar value from a ceorl or peasant.

This may be regarded as the half-way house between the penal and the remedial sanction. The contrast appears definitely, in England at least, with the taking over by the State, in addition to the 'pleas of the Crown', of the 'common pleas', or pleas of the subject, i.e. as a modern jurist would put it, civil as well as criminal jurisdiction. This was, in England, at least a century later than the full assumption of criminal jurisdiction by the State; roughly, the two dates are the twelfth and thirteenth centuries respectively. There were offences which for long remained on the border-line, notably the great offence of trespass to land. For centuries, this offence involved, not

only the payment of damages to the injured party, but also a substantial fine to the King, i.e. it was visited by both a remedial and a penal sanction. But the initiative was in private hands ; the proceedings assumed more and more a private character ; at last the royal fine, after it had long ceased to be collected, was abolished, with characteristic compensation to the official whose right it was to exact it—and get a fee for doing so.³ In other cases, where, as often happened, the same act was both matter for criminal and civil law, the proceedings were duplicated ; the Crown prosecuted criminally, the party injured sued civilly. Naturally, disputes arose as to priority of claim, which were ultimately, though not without difficulty,* resolved in favour of the State. There can be little doubt that the early development in England of the sharp division between the penal and the remedial sanction is due to the introduction and maintenance of the jury-system ; for the jury, as a body of laymen drawn from the scene of the offence (the 'vicinage' or neighbourhood), were able, with some approach to accuracy, to estimate the proper amount of compensation due to the plaintiffs in the actual cases.

It must not be supposed, of course, that the remedial or compensatory sanctions of the State are limited to the payment of pecuniary damages.

* For instance, the kindred of a murdered man succeeded, for quite a long period, at any rate in England, in maintaining a 'close time' for the murderer, during which they were at liberty to maintain their 'appeal of felony', while the King's officers could not prosecute. The consequences were disastrous ; and the arrangement had to be abolished by statute in 1486.

With the 'fungibility' of money, as a measure of value, this was the easiest ; but, in most cases, the State also guaranteed the actual restoration of property to the person from whom it had been improperly taken, though, in some systems, with a curious restriction to landed property. No doubt, in many cases, goods and chattels cannot be restored, because they have been destroyed, lost, or removed, and cannot be got at. But there seems to be a more arbitrary reason for the restriction. In feudal days, the question of who is the occupier of a particular area of land is a matter of first importance to the State, which looks to the landowner for 'services' of various kinds ; while the ownership or possession of specific chattels is of little interest to it. The reason, if it be true, is interesting ; for it throws light upon the influence of the State in building up the institution of Property. Other explanations of the restriction are given by foreign jurists, as for example, that it works in favour of commerce. For if a horse which I, in good faith, have bought from a thief for its full value, can be taken away from me without compensation, for restoration to the person from whom it was stolen, who will buy horses ? This is a possible explanation of the maxims : '*meuble n'a suyte*' of the old French Law, or '*Hand muss Hand wahren*' of the German jurists, which, as so often, state the effect of a rule as the reason for its existence.

Another classification of legal sanctions, though interesting, seems rather to have escaped the attention of writers on Jurisprudence. This is the distinction between principal and ancillary sanctions.

**Ancillary
sanctions**

The sanctions (penal and remedial) which we have already discussed may be considered to be final or conclusive in their effects. They may fail, of course, to achieve their objects, e.g. the defendant may be ordered to pay a debt of five hundred pounds, or a thousand pounds as damages; and he may not be able to do so. Various consequences may follow, according to the rules of the law to which he is subject. He may have his property seized and sold, be made bankrupt, or even be imprisoned till he pays or dies. But no one of these things is the true sanction fixed by the law for his offence. Whether they be regarded as penal or remedial, they are clearly only a means to enable the offender to satisfy the principal or primary sanction, the sanction of compensation.

These ancillary sanctions, as we may call them, arise subsequently to the failure of the primary or principal sanction. But ancillary sanctions may also precede the principal sanction, either by way of preparation for it, or to hold the scales of justice even till it be decided whether the alleged offence has really been committed.

Of the former kind are sanctions known in English-speaking jurisdictions as 'decrees of specific performance', 'injunctions', 'accounts', 'receiverships', 'delivery up or cancellation of documents', or, finally, a modern and most interesting sanction, known as the 'declaratory order'. The feature common to all these sanctions is, that the tribunal which applies them contemplates the possibility of an offence being committed, but is reluctant, for some reason, to proceed at once to apply the principal sanction. Thus, a man accuses

his neighbour of being about to build a wall which will deprive him (the accuser) of the access of light to which he is legally entitled. The Court may pronounce an injunction, i.e. order the neighbour, finally and perpetually, to stop his building operations, or may stop him temporarily till it is decided whether or not the accuser's charge is true. If A alleges that B refuses to carry out his contract to sell him (A) a house, the Court, instead of awarding damages for breach of the contract, may order B to carry out his contract, i.e. to refrain from continuing his offence. Beneficiaries complain of a breach of trust, and ask for restoration of the missing funds. The trustee denies the charge. In order to see which party is right, the Court orders the trustee's accounts to be examined by its officials. A receiver is appointed to preserve the property, title to which is in dispute, while the dispute is being adjudicated on; and a ship is 'arrested' to prevent her owners rendering useless a judgment for damages by removing her from the jurisdiction. A forged or misleading document is ordered to be cancelled or given up, lest the holder should use it for an improper purpose. The declaratory order is made to prevent persons, anxious to do the right thing, from committing an offence through ignorance of their rights. These are all remedial or civil sanctions. But the well-known and very ancient practice of 'binding over' to prevent the commission of an anticipated criminal offence, shows that the ancillary penal sanction is not unknown. It corresponds closely to the injunction in civil cases.

The essential distinction between the principal

and the auxiliary or ancillary sanction will be clear from the above examples. The principal sanction is usually imposed by the same law which creates the offence ; it is regarded by the lawgiver as the main buttress of that law. The law which says, in effect,* that the man who breaks a contract, or commits a trespass, shall pay damages equivalent to the loss caused thereby to his contractor or neighbour, contemplates the payment of damages as its true sanction. The ancillary sanctions of injunction, decree for specific performance, and the like, are really parts of the general machinery of judicial administration designed to ensure the more effective working of that machinery.

The last classification of legal sanctions which it seems desirable to consider is based on the distinction between direct and indirect sanctions. Those sanctions which we have hitherto considered may be described as ' direct ' ; because they are administered by the State itself, through its judicial and executive organization. But there is another class of sanctions in the application of which the State takes no direct part, though its attitude leaves little doubt as to its views. These may fairly, therefore, be described as ' indirect ' sanctions. There are two conspicuous examples in most modern legal systems.

**Indirect
sanctions**

The first goes commonly by the name of ' self-

* Of course there need be no express mention of the sanction. In the two examples chosen, it is believed that no English statute lays it down that the breaker of a contract or a tort-feasor shall pay damages ; but the customary rule has been enforced regularly in England for centuries.

help'. It has already appeared, and is, indeed, a commonplace with legal historians, that the administration of justice by the State is the successor of an older state of affairs in which the vindication of offences was left to private or popular action. A modern criminal trial is the historical descendant of the old 'hue and cry' and outlawry; a modern civil action is the historical descendant of the old blood-feud.' As a general rule, the State frowns sternly on any attempt to revive these discredited practices; but it recognizes that, in rare cases, they must be tolerated, because they have their roots deep in human nature. It is too much to expect, even in a normally law-abiding society, that a man who, or whose wife or child, is threatened with violent assault, or whose land or goods are seized while in his possession by a mere wrongdoer, should passively submit to the outrage, and await justification by legal process. In such cases, the person attacked is said by the law to be justified in his self-defence. More rarely, he is excused for positive reprisals, as where a man who sees an outrage actually in course of perpetration or his wife or child (*flagrant délit*) exacts vengeance from the evil-doer. In all these cases, the injured party has, *primâ facie*, been guilty of a breach of the law; but the State declines to apply the normal sanction for the breach, and refuses all appeal for justice by the evil-doer, who is really the law-breaker. This is, quite clearly, an additional, though indirect sanction attached to the law which the evil-doer himself has broken, or, at least, attempted to break.

The second conspicuous example of the indirect

sanction, is known among jurists as the 'sanction of nullity'. It is said to exist where an act or forbearance is prohibited by law, but the only evil prescribed for its commission is a refusal by the State to assist the person guilty of it to gain any legal advantage by his conduct. Thus, an ordinary bet is not an offence by English law; but no legal proceedings to enforce payment from the loser will be allowed by the Courts. This is clearly a true sanction; though of an indirect kind. Obviously the State disapproves of betting; but, either because it despairs of preventing it, or because it is doubtful as to the wisdom of treating it too seriously, it simply stands contemptuously aside, and refuses to allow its Courts to recognize it as a basis for a legal remedy. A little higher in the scale, the same rule applies to contracts with illegal objects, e.g. a contract to procure marriage for reward. To enter into such a contract is not, of itself, a punishable offence; but the Courts will not entertain an action to enforce it. Where the contract contemplates a definitely criminal offence, e.g. forgery, or the stifling of a prosecution, the mere entering into it entails punishment, i.e. a direct as well as an indirect legal sanction.

Some jurists regard another variety of the so-called 'sanction of nullity' as a true sanction, viz. the cases in which the law refuses to enforce certain transactions unless they are supported by a special kind of evidence, e.g. a will which does not conform to the requirements as to form of the Wills Act. But, as has before been suggested,*

* Chapter II, p. 38.

this is, probably, a result of the Austinian doctrine that all laws are commands. The rule in question is really a branch of the Law of Evidence, with which we are not here concerned; or it may be regarded simply as a condition upon which the State's assistance in carrying out the testator's wishes will be given.

This chapter cannot conclude without at least a reference to a problem of much theoretical difficulty, as well as of some practical importance. When a law is habitually ignored because the sanctions which it imposes are either not applied, or, if applied, are treated with indifference, does the law cease to exist?

In legal systems which recognize that a law may become obsolete by reason of non-observance it would seem to be clear that, as regards that law, the question must be answered in the affirmative. In the case of English law this recognition is said to apply to judicial decisions; and at least one well-known recent case appears to support this view, though it is possible to explain the decision of the House of Lords in that case on another ground. By certain English statutes of the sixteenth century,⁴ certain classes of gifts for so-called 'superstitious uses' were declared void; and, though gifts to be used to provide masses for the souls of the dead were not expressly mentioned in the statutes, such gifts were treated by the English Courts as 'superstitious' for three centuries. This attitude persisted, even after the passing of the Catholic Relief Act, 1829, till the year 1919. But public opinion, strongly Protestant as it was in

some directions, increasingly disapproved of legal objections being taken to the validity of such gifts ; and, where possible, enforcement of the law was avoided. At last, however, in the year 1919, it was impossible to avoid raising the point ; and the House of Lords, in the case of *Bourne v. Keane*, declared the doctrine obsolete.⁵ It may, perhaps, be urged, that this was only a case of the overruling of former decisions by a higher tribunal—an ordinary operation of the English doctrine of precedent. But the logical result of such a view is, that for over three hundred years an alleged law which did not really exist was regularly enforced by the Courts, and submitted to in hundreds, perhaps thousands, of cases. It seems preferable to accept the common-sense view, that the alleged law, which had at one time a great vitality, gradually ceased to exist, and was at last formally swept away by the House of Lords. It is also believed that certain provisions of the Catholic Relief Act, 1829, with regard to Jesuits and street processions, are in a condition of abeyance ; notwithstanding the general rule of English law which lays it down that statutes can only be repealed by legislative action.

But the answer to the question, whether a law which in fact is not obeyed has ceased to exist, seems to depend, in the last resort, on the view taken of the science of Jurisprudence. If it is a purely formal science, as some writers claim, then, without doubt, the question must be answered in the negative. For, *ex hypothesi*, the form of a law which is defied—statute, judicial decision, or text-

Is Jurisprudence a purely 'formal' science?

book principle—exists, or it could not be defied. No one doubts, for example, that the famous eighteenth amendment of the Constitution of the United States of America, exists in form; not having been repealed by constitutional means. It probably also has much more effect than some of its severer critics suppose, though these may not be precisely of the kind desired by its framers.

But, to those who hold that Jurisprudence is not a formal science only, but a material science; that it is concerned, not merely with the way in which laws are apprehended by those who study them, but with the meaning which they convey; a law which has never had, or has ceased to have, any effect whatever, can hardly be said to exist. To take an extreme case. During the somewhat complicated proceedings which culminated in the English Property Legislation of the year 1925, there was passed, and duly enrolled on the Statute Book, a long Act of Parliament, known as the Law of Property Act, 1922. By Section 191 (2) of that Act, the statute was not to take effect until January 1st, 1925. Before the latter date arrived, the commencement of the Act of 1922 was postponed by a later Act (the Law of Property (Postponement) Act, 1924), to January 1st, 1926. Before this last date arrived, large parts of the Act of 1922 had been repealed by the Law of Property Act, 1925, now on the Statute Book, which took effect on January 1st, 1926. Can the repealed parts of the Act of 1922 be said ever to have been law, in a material sense? No legal proceedings ever were, or could have been, taken under them;

they created no obligation on any person to guide his conduct by them ; no sanction could ever have been applied to vindicate them. In substance, they served merely as a project, to draw criticism, some of which was, in fact, adopted,⁶ and prepare the way for future legislation. On the other hand, whether Jurisprudence is a material or a purely formal science, a law which is enforced, however imperfectly, is really a law, though its sanctions may be weak and inadequate.

But can Jurisprudence be truly said to be a purely formal science ? Not, it is submitted, unless the word ' formal ' be used in a strained and artificial sense. It is true that the jurist can only recognize a law by its form ; for it is form which, as has been said, " causes the manifold matter of the phenomenon to be perceived ". But the jurist, having got the form, as it were, on the operating table, has to dissect it and ascertain its meaning. In a case, for example, which concerns a money-lending contract, he has not only to see that the requirements of the Moneylenders Acts have been formally complied with, but that they were really fulfilled ; that a will which, apparently, satisfies the requirements of the Wills Act, 1837, as to form, was really drawn up as it appears to have been, e.g. that the signatures of the witnesses which profess to have been added in the testator's presence were in fact so added, that the signature appearing as that of the testator was in fact his, or added at his direction ; and so forth. If by the claim that Jurisprudence is not a material science is meant that it does not include, for example, the science of legislation, we may well agree. Jurisprudence is con-

cerned with means, rather than with ends, though some of its means are ends in themselves. But to say that Jurisprudence is concerned only with forms, is to degrade it from the rank of a science to that of a craft.

CHAPTER VII

THE LEGAL PERSON

INASMUCH as the legal sanction, whatever its ultimate object, is intended to effect that object by operating upon the human will, it is necessary to consider the nature of the depository of that will. This depository may be conveniently described as the 'legal person'. Moreover, in order to apply the sanction to the will intended to be affected, some other will must be employed. A law implies, therefore, not only a person or persons who is or are its subjects, but another person or persons who is or are its agents, i.e. entrusted with the task of putting it in force. Thus the legal person may be either passive or active in relation to the law.

The most common and obvious depository of the human will is, of course, the individual human being. It is for this reason that, in some legal treatises, the individual is spoken of as a 'natural' person. But this practice is to be deprecated on two grounds; first, because the word 'natural' is, as has been said,* frequently used to signify non-human as opposed to human objects, and is, therefore, obviously unsuitable to describe human beings, second, because individuals are no more 'natural', though they are more numerous, than

* Chapter I, pp 2-3.

other legal persons. That is to say, if the lawgiver finds anywhere another entity which can and does show the capacity for exercising a will, there is, *primâ facie*, no reason why he should not aim to affect it through the instrument of the legal sanction. In fact, in every modern system of law he does so, though the extent to which he does so is a matter which differs from system to system. Before proceeding, however, to discuss the difficult problem of the treatment by the law as legal persons of entities other than individual human beings, it will be wise to dispose of the easier problem of the individual human being as a legal person.

The movement towards equality of treatment by the law of all the members of a given political community, which has been a striking feature of modern history, has resulted in an assumption by the State that the laws which it enforces will apply to the great majority of the members of the community in the same way and on the same terms. In other words, the law of the State assumes the existence of a normal type of legal person. This is, of course, a comparatively modern feature in legal systems. The medieval conception of a political community was, that it consisted of a collection of ‘ estates ’, or ‘ orders ’, i.e. groups or classes of individuals governed by different laws—nobles, clergy, peasants, merchants, craftsmen. A few of these distinctions still survive in modern systems, in the privileges or disabilities of certain classes of individuals. But they are becoming rarer and rarer, with the result that the lawgiver tends to ignore them in his pronouncements ; and the assumption grows, that all individuals are

'equal before the law'. There has, in fact, been a process of social and legal integration so powerful, that even the jurist is apt, somewhat hastily, to assume that it is complete, so far as individuals are concerned; though, in fact, in recent years, there has been a reaction which threatens to revive, in at least one conspicuous case, the medieval notion of the 'estate' or 'order'.¹

Nevertheless, it is a fact that, in every political society, there are very large classes of individuals who do not conform to the normal type envisaged by the lawgiver—so large, indeed, as to make the description of 'normal', as used to describe that type, look somewhat arbitrary. The most conspicuous of these exceptions is, in English law, the class known as 'infants', i.e. individuals who, by reason of age, cannot be treated as normal persons. The precise proportion which such persons bear to 'normal' adults in any given community is a matter of statistics; but in the average political community it is very considerable. Likewise, the precise points in which members of this class differ in their legal capacity from 'normal' persons, is matter for each legal system. But it may be said, roughly, that, in England, while in matters of remedial justice 'infants' have all the advantages and liabilities of the 'normal' person, so far as unilateral acts are concerned, in bilateral transactions, especially in contracts, they have the advantages of the normal person without his liabilities; but that, in matters of penal justice, though their advantages are fully safeguarded, their liabilities are substantially less than those of adult individuals.

**Abnormal
persons**

In England, also, until quite recently, and in many countries at the present day, the application of the law to married women was, and is, substantially different from its application to men or unmarried women. In view also of the psychological operation of the State's laws, it is impossible to apply to lunatics and other persons of unsound mind the normal standards of such laws. So also with aliens, or persons not members of the political community of which the State is the organ. These persons, though, by reason of the fact that they are resident in the State's territory, they are, as has been said, to a considerable extent affected by the operation of the sanctions attached to its laws, are yet by no means, in most countries, entitled to the benefit of all such laws. So also, though to a more limited extent, convicts (i.e. individuals undergoing sentence for serious crime), and bankrupts, suffer from considerable disabilities in most systems.

For these abnormal classes of persons, it is necessary, in every legal system, to make provision. But it would add intolerably to the burden of the legislator, the judge, or the textbook writer, if, in enunciating the law, he were compelled in every case to detail the modifications of his language which a separate treatment of such persons would entail. If, for example, the framers of the English Forgery Act of 1913 had been obliged, in defining each of the crimes provided for in the Act, to add the modifications necessary to make clear its application to persons of tender years, or lunatics, the statute would have been doubled or trebled in length. Consequently, the legislator and the textbook writer, no less than the framer of the com-

prehensive Code, makes a separate department of his work which defines the classes to which such persons belong, and summarizes the abnormalities affecting each. To such summaries the comprehensive name of 'Law of Persons' is commonly given; and the members of such classes are said to occupy a *status*. Both expressions are unfortunate; for the former implies that the normal individual is not a 'person' (which is manifestly untrue), while the latter suggests that the normal individual has no *status*, which is again untrue, unless we give to the word 'status' a somewhat arbitrary meaning. About the last point a few words must be said.

A *status*, in the widest and oldest sense of the word, is simply 'standing' or 'position'. It is, in fact, the modern equivalent of the
Status older word 'estate', to which we have previously alluded, and which survives in the expression 'estates of the realm'. Not unnaturally, it has retained something of the meaning which attached to the older word in the days of its importance; in particular, the two qualities of conspicuousness and fixity. In medieval (and, for the matter of that, ancient) society, the estate or order to which an individual belonged was the most conspicuous fact in his social position. Moreover, his position was not a matter of his own choice, nor, as a rule, could he quit it without great difficulty. These features have survived in the modern conception of 'status'. Modern systems of law do not treat, for example, the positions of a landlord, a trustee, or a physician, as matter for the law of status, although, in fact, such positions are subject

to special legal sanctions ; because they are not regarded as so conspicuous or abnormal as to place their holders in a class apart from the average citizen, and also because they are positions which can be acquired or lost by the voluntary acts of the holders. But the positions of the infant, the lunatic, the convict, or the alien, besides being conspicuous, are determined irrespectively of their own choice, or, as it is sometimes put, the consequences of them not only render the occupants conspicuous exceptions from the normal rules of the law, but they are such as cannot be varied by contract. Other marks of 'status' have been suggested, but none of these seem to be very satisfactory ; and it is submitted that the two features above described are adequate to convey the meaning attached by the jurist to the term.

The remaining juristic problems are (1) to decide whether, in an ideal arrangement of a legal system, the law of status should precede or follow the rest of the law, and (2) by what name it should be called. As to the first problem, it would appear to be practical as well as logical, from the point of view both of the student and the practitioner, that the general law should precede the exceptions. Of what use, for example, is it for a jurist to know that an infant is presumed to be incapable of committing a crime until he has attained fourteen, unless he (the jurist) knows what a crime legally is ? Or that an alien is incompetent to exercise the Parliamentary franchise, unless he knows what exactly the Parliamentary franchise is ? As for the name to be given to that branch of the law which deals with the peculiarities of status, the 'Law of Persons' is

meaningless to anyone who is not familiar with the terminology of Roman Law ; while the ' Law of Status ' requires elaborate explanation as well as being etymologically misleading. On the whole, ' Law of Abnormal Persons ' would appear to be the most correct as well as the most informing of suggestions.

A much more difficult type of abnormal legal personality is the Collective Person (*universitas*),

**The Collective
Person**

It has been recognized from an early period in legal history that a collection, to use a comprehensive term, of individuals may have such a unity as to be capable of being treated as having a common will, and as such, to be a legal person. The liability of the kindred of the actual offender to be treated as participators in the offence which gave rise to a feud, and the right (or duty) of the kindred of the victim to ' take up ' the feud, are striking examples. Very like them is the ' amercement ' of the neighbouring townships for failing to produce the murderer of a Norman, and the liability of the burgesses of a borough as a whole to be ' tallaged ' for the payment of the King's dues. Later English law, at a somewhat uncertain date, adopted a very rigid theory that neither collective liabilities nor collective powers could be incurred or claimed by a body of individuals unless it could satisfy the requirements of ' incorporation '. But other systems have been more liberal, e.g. the Roman Law which treated the *fisc* and the *hæreditas jacens* as persons, the German which recognizes the personality of the *Stiftung* or foundation for the furtherance of some lawful object (the *universitas rerum*

as distinguished from the *universitas hominum*), the French, which actually treats a colony as a *personne morale*, and the United States law which goes so far as to allow an action to be brought against 'The People'. It is to such latter entities as these, if at all, that the somewhat derogatory names of 'artificial', or 'fictitious', or 'juristic' persons should be given. English law is reduced to strange shifts by its refusal to recognize similar personalities, e.g. by declining to recognize the personality of the estate of a deceased intestate, but, on the appointment of an administrator, making his title 'relate back' to the intestate's death, so as to enable him to sue or be sued on claims arising in the interval. Other cases show that the rigidity of the theory has been found irksome by the English Courts; for example, in the *Taff Vale* case of 1901, previously alluded to,² where the funds of a Trade Union were held liable for the consequences of the acts of individuals alleged to have been authorized by the Union's officials, though the Union was clearly not a 'corporation'.

Perhaps the most striking example of the differences of opinion which may arise on this question

is a controversy which has long been proceeding in high juristic circles in

Is the State
a person?

France, as to whether the State is a *personne morale*. M. Léon Duguit, of whose views we shall have to say something later on, denies the personality of the State as the most barefaced of fictions,³ while an equally eminent authority, M. Henri Berthélemy, the learned *doyen* of the Faculty of Law in the University of Paris, takes the opposite view.⁴ It must not be supposed that this

acute struggle is merely over words ; for many practical consequences follow from the acceptance or denial of the personality of the State, more particularly as to the liability of the State for the acts of its officials and functionaries. English Law, with characteristic tenacity, refuses to recognize the State as a person, but is willing to admit that ' the Crown ' is a corporate person. Here again the practical consequences of the conclusion are important, as every student of English Constitutional Law is aware.

Manifestly, the difficulties of the Collective Person are great. The individual person has a physical integument which at the same time limits and extends his activities. His span of life is restricted and uncertain ; he can be made to suffer through his body ; the effect of his activities is somewhat circumscribed. The collective person (e.g. a college or town corporation) may live for centuries ; it can hardly be affected directly by physical sanctions, such as imprisonment or hanging, though, of course, its members may be ; its range of action may be enormous, as in the case of the East India Company before its dissolution. On the other hand, a collective person, as such, cannot eat a dinner, marry a wife, or beget children ; while an individual person can do all these things. Finally, there is the metaphysical problem : How can the individual members of a collective person be treated as living two distinct lives, one as individuals, the other as parts of a collective personality ?

The answer, in principle, to most of these difficulties is to be found in the word ' organization '. A chance crowd cannot be treated as a person,

because it has no common purpose, and, if it had, it has no means of giving effect to it; both are necessary for legal personality. The Church of England, with an obvious common purpose, is not a legal person; because it has no legal organization to give effect to it, no unified legal machinery by which its will can be expressed. Until a comparatively short time ago, when the Ecclesiastical Commission was established, the Church of England, as such, could own no property, though its officials held vast sums which, by a rather elaborate network of statutes, they were constrained to apply for its work. The Church of England, even now, despite the advance in its legal organization made by the Church Assembly Act of 1919, can, probably, not bring or defend any action in the King's Courts, enter into any contract, or commit a trespass or other 'tort'; and it is doubtful whether a gift to 'The Church of England' by deed or will would, quite apart from questions of 'mortmain',⁵ be effective. Who would be able to give a receipt for it? The Church of England has, of course, a personality; but, has it a legal personality? What of the Inns of Court? They are believed to take the view that they are not corporations. Have they then no legal personality?

The reasons for the somewhat narrow view of legal personality taken by English law are not far to seek. English law is, as before remarked, an inductive system, which has been built up piecemeal by attempting to solve practical questions as they arise. Its definitions are casuistic rather than complete. It does not (except for purely limited purposes) define such important concepts as crime,

tort, or misdemeanour ; it contents itself with enumerating certain acts or omissions which are crimes, torts, or misdemeanours respectively.

It is, probably, this characteristic attitude, rather than any attempt to define legal personality, which has determined the treatment by English law of the Collective Person. English law has set itself to answer such practical questions as : If this group of individuals is to be treated as a person, how is its will to be discovered ? How is that will to be manifested to outsiders ? How is its property to be administered ? How is it to sue and be sued ? If it professes to enter into contracts, how are those contracts to be enforced ? To what extent are its members to be individually responsible for its alleged collective acts and defaults ? Is any restriction to be placed on the scope of its activities, and, if so, what ? To these and similar practical questions, English lawgivers have, in effect, returned replies somewhat to the following effect.

Before all things certainty is desirable. We cannot secure complete certainty ; but we can insist that every collective person which the Courts are required to recognize shall be able to point to some authoritative document having the approval of the State, which defines, more or less completely, the purpose for which it exists, the means by which its will is discovered (e.g. by a majority vote), the means by which that will is manifested (e.g. by its common seal, or by its ' attorney ' or agent), the methods by which its work is to be carried on, the liabilities of its members in their individual capacity, and so forth. This document may be special to the par-

The
' Corporation '

ticular corporation itself (e.g. a so-called 'common law' royal charter), or it may be a lengthy Act of Parliament, such as the Companies Act, which contemplates an indefinite number of corporations more or less mechanically created under it on similar lines, or a mixture of the two, such as the charter of a modern borough under the Municipal Corporations Act of 1882. Should any question arise as to whether any act alleged to be done by, or omission alleged to be imputable to, the corporation is to be treated as binding upon it, we have merely to look at the words of the Act of Parliament, royal charter, or other document of incorporation applicable to it for the answer. If such act or omission is not within the legitimate sphere of the corporation's purpose, as defined by such document, we say it is '*ultra vires*'; and, whatever be its consequences to the individuals actually guilty of it, these consequences will not bind the corporate property. If, again, it is a question between the officers of the corporation and its members, or some of them, as to the alleged mal-administration of the corporation's assets, again we look to the documents of incorporation, to see whether the right procedure has been followed.

If, as occasionally happens, there are, in fact, no documents of incorporation, English law meets the difficulty in a very characteristic way, by recognizing, where the corporation has, obviously, been treated as an actual legal person for a very long time, that there may be a 'corporation by prescription', founded on the fiction of a 'lost grant'. But the situation is here delicate; for the

doctrine of *ultra vires*, as applied to corporations, is really very modern,* and, naturally, peculiarly difficult to apply when there is no documentary evidence. But English law is always willing to stretch a theory to meet practical difficulties.

Nevertheless, it would seem, even from the standpoint of the jurist, as distinguished from the statesman, that the treatment by English law of the Collective Person is inadequate, and, not infrequently, works substantial injustice. Perhaps the best example is the case of the ordinary social, or athletic, or 'benefit' club, which plays a very large part in English life. There are many thousands of such institutions in existence; and the total amount of economic interests involved in them must be enormous. But, as compared with their total numbers, very few of them are 'corporations'; and, consequently, they are treated by the English Courts, virtually, as if they did not exist, save, perhaps, as evidence of 'conspiracy' amongst their members, if any question as to the legality of their objects arises. This fiction, for it is really very little more, persists, in spite of the most manifest evidence of 'reality' on the part of bodies which secure royal personages as their patrons, draw together thousands of spectators to witness their activities, and, in the aggregate, raise and expend vast sums of money.

* It is said to date, in effect, from the great outburst of railway activities in the first half of the nineteenth century, when the energies of the new railway companies threatened the interests of some of their rivals in transport. But it has since been applied, with considerable effect, to restrain the activities of municipal corporations.

A certain advance towards recognition of these unincorporated societies has, it is true, been made by the legislature in providing for the prosecution of officials who embezzle their funds ;⁶ and the Courts have responded by recognizing the popular device of the appointment of trustees to enable them to preserve and deal with their property, to some extent, as legal persons.⁷ But, apart from these limited improvements, the legal position of the unincorporated society in English law is thoroughly unsatisfactory, not only to its members, but to the general public. A tradesman who supplies goods for the use of a club, which are, in fact, used or consumed by the members, cannot sue the club for the price, but only the official who gave the orders, and, if he can prove express or implied authority on their part (not an easy thing to do), the members of the committee of management. Conversely, a club may suffer cruelly by an outrageous and wholly unfounded libel upon it uttered by an unscrupulous individual who is annoyed at a refusal to elect him a member ; but the club has no direct legal means of vindicating its character, though it is just possible that a criminal prosecution by the Crown, or individual actions for damages by members, might succeed. Finally, the wholesome rule of English law, that every eleemosynary corporation must have a Visitor, whose function it is to act as *bonus paterfamilias* in composing the internal quarrels, and stimulating the energies, of the corporation, does not apply to unincorporated bodies.

On the other hand, in one particular case, English law has shown a liberality in the recogni-

tion of the legal person which, it is said, is not to be found in other systems. This is the case of the 'corporation sole', i.e. the collective person which, at any given moment, consists of a single individual, but has a collectivity of an indefinite succession of single individuals. Familiar examples are the bishop of a diocese and the rector of a parish. The practical results of the institution are valuable; for, by means of it, property which is intended for the perpetual service of an important function, can be safeguarded from depredations by its temporary administrators, and difficulties of the transfer of rights and liabilities on death or resignation overcome. Still, the difficulties of the concept itself are great. It is not easy, for example, to imagine the rector of a parish, as such, suing himself as the individual William Smith, for injury to the corporate property; and the fact that, until recently, it was the rule of English law that a 'corporation sole', unlike a 'corporate aggregate', could not hold chattels (as distinct from land) in its corporate capacity, shows that the difficulties in the situation were felt to be great.

There would, it may be suggested, be little practical difficulty in the working out of a more liberal view of the Collective Person than that adopted hitherto by English law. A short Act of Parliament might direct the Court, upon an unincorporated society coming before it as plaintiff or defendant in a civil action, to order a preliminary enquiry to be undertaken by one of its officials (a Master or Registrar) as to whether it had the essential

features of personality laid down by the Act, or, possibly, such features as the Court deemed to be essential in the particular case. Such an enquiry would be no more difficult than other enquiries which are habitually directed to such officials. Upon the report of the Master or Registrar that these essential features existed in the society suing or being sued, the case would proceed in the ordinary way ; if the report were in the negative, the case would be struck out of the list, as at present. A judgment against the society might be made effective in more than one way.

It may even be suggested, that the same principle might be applied in the case of an unincorporated society being accused of crime.* It is true, of course, that the criminal prosecution, even of a corporation, is attended with difficulties, owing to the well-known doctrine of the requirement of *mens rea* ⁸, or guilty intent, to substantiate a conviction for many of the more serious crimes. Also there is the difficulty of applying penal sanctions even to a true corporation aggregate. Such a body can hardly be hanged, or imprisoned, or whipped ; though any of its individual members can be subjected to these sanctions. But even an unincorporated society can be fined ; and, as it is now the

* There is no difficulty even in English law about the unincorporated society acting as prosecutor ; for prosecution is in the name of the Crown, which can act upon the information supplied by anyone. The trouble before alluded to about prosecutions for embezzlement of the funds of an unincorporated society by its officials or members was that, in strict law, such a society could not own any funds, also that, in law, the funds of the society belonged to its members, who, naturally, could not embezzle ' their own ' money.

doctrine of English law that a corporation aggregate can be convicted of a criminal offence which does not imply *mens rea*, e.g. the exposure for sale (regardless of knowledge or intention) of food unfit for human consumption,⁹ there would seem to be little difficulty in extending a similar liability to unincorporated societies, viz by the imposition of a fine. We may well share the dislike manifested by Bentham¹⁰ for fictions which appear in the guise of 'reasons' for a rule of law, and the view of Sir Henry Maine¹¹ that, while legal fictions have, in early stages of legal development, sometimes acted as cover for desirable reforms which could not, owing to prejudice against change, be otherwise achieved, yet that the legal fiction is a dangerous engine of law reform. But, if the view which we have taken of the Collective Person has any truth in it, we may well doubt whether a more liberal view of the subject than is at present taken by English law would, in fact, involve the use of a fiction at all. Would it not rather be a recognition of reality?

CHAPTER VIII

LEGAL DUTIES AND RIGHTS

THE immediate effect, as distinguished from the ultimate purpose, of the operation of a law, is, in the majority of cases, the creation of a relationship between legal persons which is summarized in the words 'duty' (*devoir, Pflicht*) and 'right' (*droit, Recht*). English law has the singular advantage in this matter, that, whereas in French and German law the words *droit* and *Recht* are used to signify the law itself as well as the relationships which it creates, in English law there is no such ambiguity. In French law the ambiguity, where it is explained at all, is resolved by using the expression *droit objectif* as equivalent to 'law' and *droit subjectif* as equivalent to 'right'; in German by the corresponding *objectives Recht* ('law') and *subjectives Recht* ('right'). But the desire for brevity frequently causes the necessary qualification of the words *droit* and *Recht* to be omitted, with the result that the hearer or reader is sometimes genuinely puzzled, especially if he is a foreigner, to know which meaning is intended. Thus, for example, the title of Savigny's famous work, *Das Recht des Besitzes*, might, to an Englishman, read, equally well, either as The Law of Possession or The Right

of Possession.* It is a highly significant fact, though we cannot here dwell on its significance, that a similar ambiguity once prevailed in English legal language. In Old English law, the expression 'folk-rīt' means 'folk-law', as well as what we should now call 'folk-right'; and it is only the subsequent process of specialization which has given English law its present clear distinction.

Two preliminary observations may be made before we proceed to discuss in detail the highly important concepts of the legal duty and the legal right, with their many varieties, and the technical meanings of each.

One is, that for immediate purposes we may say, that the former concept ('duty') signifies a burden or obligation laid upon a legal person by the law, while the latter ('right') signifies a power or capacity conferred upon him. But, as will appear, the importance of these concepts, and the many varieties of which they are susceptible, makes it necessary to regard this only as a general description, not a definition.

The other preliminary observætion is, that English jurists differ considerably as to the relative importance of these two concepts in the legal scheme. Dr. Holland, for example, treats the creation of rights as the immediate or main purpose of the law, and bases, substantially, his scheme of a legal system upon them¹; while Dr. Hearn, in

* In this particular instance, a glance at the work of Savigny is enough to show that the learned author intended a treatise on 'The Law of Possession'. But what about the *Recht des dreissigsten* referred to in Article 1969 of the German Civil Code?

his book *The Theory of Legal Duties and Rights*,² as its title implies, treats rights as accessory to the primary concept of duties, the immediate creation of law. In fact, Dr. Hearn makes a suggestive comparison in this respect, between Jurisprudence and Political Economy (in which he was also an expert), and declares that "the discussion of either science may proceed a long way without any enquiry, in the one case into rights or, in the other case, into values". Sir John Salmond appears to adopt Dr. Hearn's view³; and Sir Frederick Pollock, though he does not deal at length with the question, seems to incline the same way.⁴ With abundant authority on either side to support him, the author may, perhaps, be permitted to say that he adopts the view of Dr. Hearn, for the practical reason, that it seems impossible to explain the nature of a legal right without previously explaining the nature of a legal duty.

It has already been stated, that the immediate effect of every law is to impose (to
The legal duty use non-technical terms) a burden or obligation upon all persons to whom it is addressed. It necessarily places a direct limit upon their freedom of conduct, because it is intended to influence that conduct in certain directions. The free will of such persons is restricted by it, even though, in the main, they approve of it and find no difficulty in observing it. Most people have occasional impulses towards anarchy; and these it is an important object of the law to restrain. Most people also, dislike certain positive, as contrasted with these negative provisions of the law; for example, the provisions which compel them to pay

taxes. Here, again, the laws of practically all States impose substantial burdens and obligations upon them. It is not too much to say that, in the matter of the restraint of their wills, they are in a position similar to the man whose body is bound by a burden or a chain.

But it should be carefully observed, that a legal duty is a very special kind of burden or obligation. It is not, for example, a physical but a psychical burden or chain. No State, for example, in its desire to prevent theft, would or does proceed to place the whole of its subjects under lock and key in order to deprive them of opportunities of stealing. It deliberately offers each of its subjects an inducement, the legal sanction discussed in a previous chapter,* to refrain from stealing. This sanction is not in itself a penalty or reward ; it is a threat, or announcement, that if, for example, the law against stealing is broken, the breaker will suffer a penalty, or, in the somewhat rare case of a law offering rewards, that an observance of that law will bring a reward. Thus a legal duty has been defined as ' a contingent liability to a sanction ' ; and, though the definition has the drawback of substituting the accessory for the principal, it has the merit of marking an essential characteristic of the legal duty. The law offers the persons whose conduct is intended to be affected the choice between conformity and disobedience ; though, doubtless, its main object is to secure obedience rather than to apply a sanction. At the same time, it seems impossible to say that, if the State clearly indicated its will, though without

* Chapter VI.

prescribing any specific sanction for disobedience to it, the subject would not be under a legal duty to obey, or that the State would not be morally justified in applying a reasonable sanction to supply the omission, even after the disobedience had taken place. Roman Law is said to have actually recognized ' laws of imperfect obligation ' ; but the examples given are not very clear. English law has an effective, but not very scientific, rule, that the commission of any prohibited act to which the law has annexed no express penalty is a ' common law misdemeanor ', entailing fine or imprisonment at the discretion of the Court. The imperfections of language have led to the performance of the act enjoined, or the abstention from the act forbidden, being described as the ' duty ' in question. Thus we say ' honesty is a duty ', or ' to give notice of a death is a duty '. What we mean, strictly, is that a person is under a duty to be honest or to give notice of a death. Such ellipses of speech are often harmless ; but they are apt to obscure the true position.

From what has been said, it will appear that the legal duty, though, undoubtedly a liability, is, as has been said, a special kind of liability. It is a liability from which it is, in theory at least, possible for the person liable to escape, by the exercise of his will. We say that a man is under a liability to be ill, or to grow old ; but it would be idle and cruel, in spite of the views of certain ingenious Utopians,* to penalize a person for doing some-

* e.g. the late Samuel Butler, one of whose delightful novels, *Erewhon*, describes a community, the law of which makes illness a punishable offence.

thing which he could not help doing, or to offer a reward for the doing of an act which could not be done. On the other hand, it would not be unreasonable to penalize him for taking drugs calculated to produce illness or senility ; because the nation, of which the State is the organ, has an interest in the physical welfare of its citizens. And any one who disobeyed such a law would be penalized, not for being ill or senile, but for taking the noxious drugs, which was his voluntary act. We have already discussed * the difficult case of the omission, through sheer inadvertence, to do an act required by the law ; and there are other difficult cases, such as those of the person who fails to pay his legal debts through simple inability, or the weak-willed person who cannot resist the temptation to take drugs. Humane systems of law make special provision for such cases ; they fall within the ambit of the Law of Abnormal Persons discussed in the last previous chapter. But, generally speaking, it is a logical and legal defence to a charge of a breach of legal duty that the accused's will was overcome by force, or threats of violence, or was influenced by fraud or mistake. The apparent offence, in such cases, was not, in fact, the result of the exercise of the accused's will.†

It is hoped that the nature of the legal duty has now been made clear ; but the concept is so vital, both for the understanding and the working of the law, that we may, perhaps, be forgiven if we insist

* Chapter II, pp. 35-6.

† The case of the person placed under a legal liability by the occurrence of an ' accident ' will be found discussed in Chapter IX, p. 192.

on two characteristics of it which are essential if its functions in a legal system are to be fulfilled.

The first of these is, that every legal duty must be incumbent on a specific legal person or persons. This is vital if the operation of the legal sanction is to succeed in its object. Who exactly are the legal persons intended to be placed under any legal

Universal duties duty is a matter of law, to be ascertained in any given case by the study of the law. There are some legal

duties which are incumbent upon all normal citizens. Most of the duties imposed by that branch of a legal system which is called the Criminal Law are of this kind. These are direct and universal in their operation. The consequence is, that if any person is charged with a violation of one of them, there is usually no question whatever as to his being 'obnoxious' to the duty (i.e. bound to observe it); the only question is: Did he in fact

General duties commit a breach of it? Even in the Criminal Law, however, there are some duties imposed only on specific classes of persons, e.g. parents and guardians, Government officials, aliens. In a charge of breach of a duty imposed by such laws, it is incumbent on the prosecution to prove, not only that the person charged failed to obey the law, but also that he is a member of the contemplated class. The legal duties of the first type are often called 'absolute duties'; but, for reasons which will subsequently appear, are better described as 'universal duties'. Those of the second type may conveniently be called 'general duties'. Both types of duties are to be found in what is called Criminal Law, in the

Law of Property, and in what is called in the English system, the Law of Torts (the French *délits*, the German *unerlaubte Handlungen*), i.e. offences not gross enough to entail criminal prosecution, but left to the redress of the injured person. Both types may be described as being directly imposed by the law.

On the other hand, legal duties may be imposed, as it were, at one remove, or indirectly. The law may, for example, lay down the rule, that every one who enters into an agreement having certain general (or, in some systems, special) characteristics, known as a 'contract', shall perform his part of such agreement, on pain of being compelled to make pecuniary compensation to the other party if he refuses or fails. This is the case, usually, in the Law of Contract of every civilized country. It will be observed, that the mere laying down of this rule does not directly impose a duty on any person. It is only when a person enters into an agreement of the kind contemplated, that he becomes definitely liable to a sanction. In theory, at least, no one *need* be affected by the sanction, because no one, in theory, is obliged to enter into any contract. As a matter of practice, of course, most of us would find it impossible to lead a normal life for more than a few days without entering into a contract, e.g. by ordering a joint of meat from the butcher, or travelling by public omnibus. Consequently, the sanction of the law compelling the observance of contracts, though it ultimately imposes countless duties, only imposes them, as has been said, at one remove, or indirectly.

Particular
duties

Curiously enough, there appears to be among English jurists, no recognized term for expressing the distinction just discussed, though it has considerable practical, as well as very great scientific importance. Those jurists who come nearest to doing so, confuse it with another distinction which, it will be later submitted, is unsound, and is, in any case, based on wholly different considerations. This latter distinction classifies legal duties into 'absolute' and 'relative'. But the latter distinction is not based on the directness or indirectness of the imposition of the duty, but on the (alleged) distinction between duties which have and those which have not corresponding rights. Thus, for example, Dr. Hearn writes, "absolute duties are those which do not concern any person but the commandee" * (Dr. Hearn accepts the Austinian view that all laws are commands). When we come to deal with the enforcement of duties,* we shall have reason to think that there are no such duties, and, consequently, that the term 'absolute' is misleading. No such objection attaches to the use of the words 'universal' for duties incumbent upon every one subject to the legal system of which the law imposing such duties is part, or 'general' for those incumbent on large classes of such persons; and it is for this reason that we have proposed to adopt them. But, in any case, the distinction between legal duties directly imposed and legal duties indirectly imposed is something entirely different, and, as has been said, of great importance. For example, A brings an action against B

**A false
distinction**

* See *post*, pp. 176-9.

claiming damages for an assault, i.e. for breach of the universal duty of every member of the community not to invade the bodily security of another without leave of that other or the State. The only question for the Court to decide is: Did B so invade the bodily security of A? On the other hand, if A brings an action against B for failing to supply goods in accordance with an order sent to him by A, the Court has to decide, not merely whether B did or did not, in fact, supply the goods, but, as a preliminary, whether he had entered into any binding agreement to do so. For, in the economic conditions which are reflected in the laws of most countries (though it might be quite different in a system of State socialism), no one is under a legal duty to supply goods to another unless he has entered into a contract to that effect. In other words, B is only indirectly placed by the law under a duty to supply goods to A.

A really difficult question arises, however, when the number of persons indirectly subjected by the law to a legal duty is not only large, but is determined generically, i.e. by classes. For example, innkeepers (i.e. persons who profess to keep inns for the entertainment of all travellers who may desire to use them on certain terms) are by English law subjected to various legal duties which are not imposed on all the members of the community. They cannot, if they have room to spare, arbitrarily refuse to lodge travellers; they are under a duty to safeguard travellers' goods much more severe than that attaching to an ordinary bailee or custodian. Moreover, innkeepers are a very numerous class; though they are not co-extensive with the

community. On the other hand, they voluntarily assume the position to which the law attaches the legal duties above described; and so those duties may be said to fall within the type of indirect duties. Are those duties directly or indirectly imposed by the law? The answer would appear to be in favour of the latter view. For, in the event of an action being brought to recover damages for an alleged breach of them, the Court would have to enquire, not merely whether the alleged breach, e.g. refusal to receive guests or failure to safeguard their luggage, had in fact occurred, but also whether the defendant fell within the legal class known as 'innkeepers'. There are border-line cases which create even more difficulty. It is said that, by English law, every male able-bodied individual is under a legal duty to assist a police officer in maintaining public order if called upon to do so, and is liable to fine or imprisonment if he fails. Is not this a duty directly imposed by the law, though it leaves out of account more than half the population? It is suggested that the true test is, whether the entry into the class contemplated by the law is or is not the voluntary act of the party alleged to be affected by the sanction. If it is, then the duty is indirectly imposed, requiring the will of the party as well as that of the State to concur in its imposition, as in the case of the innkeeper; and to these duties we may conveniently give the name of 'particular duties'. If it is not, as in the case of the able-bodied male, then the duty falls under the head of those imposed directly by the law. But, to distinguish such duties from those imposed on all normal persons, we describe

them as 'general duties'; and thus our classification of legal duties on the basis of applicability would give us the three classes of—

1. *Universal duties*—binding on all normal members of the community.
2. *General duties*—binding on classes of normal persons not voluntarily formed.
3. *Particular duties*—binding only on persons who have voluntarily undertaken them.

One other characteristic must attach to every legal duty, if it is to perform its appointed part in the administration of the law. Not only must the person or persons 'obnoxious' to the duty be determined, generically or specifically, with sufficient accuracy; but the acts and forbearances which that duty requires on his or their part must be defined with sufficient completeness to enable them to be recognized by Courts of Justice as proved or not proved in a given case, because only in that way can a breach of duty be ascertained. It is this requirement which renders ineffective many of the 'declarations of fundamental principles' which figure so prominently in modern Constitutions, of which examples have previously been given.* For instance, the first article of the German (Weimar) Constitution of 1919 states, as has been mentioned, that 'the State (*Reich*) is a Republic'. This may fairly be taken as a prohibition imposing upon all German citizens a duty to abstain from all acts tending to overthrow the republican system. But what acts come within this category? Quite

Contents of a
legal duty

* Chapter II, pp. 31-2.

clearly, any attempt to set up by force a monarchical system would do so. But what about a movement peacefully conducted, by literature and public meetings, to bring about a change by constitutional means? Clearly the interpretation of the Article in question would depend upon the personal views of the judges called upon to enforce the alleged duty, to an extent which would deprive the law of that element of preciseness which is a requisite of all juristic laws.

It is, of course, one of the peculiar features of the English Constitution, that much of it takes the form of judicial decisions, which, whatever their imperfections as a form of law, rarely suffer from vagueness or want of precision. Yet, some of the admitted rules of Constitutional Law have been found difficult of enforcement because of their vagueness. For example, it has been the accepted view of all writers on and interpreters of the English Constitution for many years, that the Constitution guarantees, subject to certain definite limitations, the 'right of free speech' to the ordinary private citizen. Yet, it seemed to be the view of the Courts, until a short time ago, that a few rowdy members of the audience at a public meeting called to discuss public affairs, might, with impunity, practically render peaceful discussion impossible, provided only that they refrained from assault and trespass. It was, therefore, found necessary, in the year 1908,⁶ to pass an Act of Parliament to provide, that any person who at a lawful public meeting acts in a disorderly manner, for the purpose of preventing the business for which the meeting was summoned being discussed, should

be criminally punishable. It may, possibly, be a solution of practical difficulties in the future that the highest legislative body should confine itself to laying down principles as guides to action, leaving details to be settled by other branches of the State machinery. There may, in fact, be much to be said for a plan carefully worked out on such lines. But, in some way or another, if the administration of the law is not to be dangerously capricious, the citizen must be able to know exactly what the State, as representing the political society of which he is a member, requires him to do or not to do.

Before leaving the subject of the legal duty, it is necessary to consider a somewhat famous classification of legal duties which, in the author's respectful opinion, is wrong in principle as well as inconsistent with practice. This is the distinction, elaborated by Austin,⁷ between 'primary' and 'sanctioning' duties. The former are those which "do not arise from injuries or wrongs", while the latter "arise directly or exclusively from injuries or wrongs". The expression 'injuries or wrongs' is rather vague for a jurist who prided himself on the use of exact language; but we may take it, from the context, to mean breaches of (other) duties. Thus, in Austin's view, the obligation of the citizen to refrain from defamatory words or writings (slander or libel) is a 'primary duty', because it exists quite independently of any previous breach of duty. But the duty to pay damages or suffer imprisonment for a breach of the law of libel only arises after the law of libel

has been violated, i.e. after the duty imposed by it has been broken, and is, therefore, a 'sanctioning duty'. That these two concepts are distinct may be submitted; but that the latter is a duty may be denied. The essence of a duty is that the sanction of it should be avoidable or (in the case of reward) obtainable, by obedience to the law. But the libeller has no choice; he has already incurred the sanction of his breach of duty. He is *liable* to undergo imprisonment or pay damages, or both; but he is not under a duty to do either, because he has no choice in the matter. If he is lucky enough to escape either sanction, it will not be by his own merits or choice, but by the indifference of the State or the person libelled. Dr. Hearn very rightly points out,⁸ that the classification or sub-division of legal systems on the basis of the distinction between primary and secondary (or sanctioning) rights and duties, is practically unworkable—it leads, for example, to such inconveniences as the bracketing together of civil and criminal rights and duties. But it may be added that it is wholly illogical. It is, again be it said, essential to the concept of the legal duty, that the person on whom it is imposed should decide for himself whether to obey or disobey it. Having disobeyed it, he becomes at once liable to the sanction, independently of any choice of his. He is not under any 'duty' to suffer the sanction, any more than the person who swallows poison is under a 'duty' to suffer the consequent pains. Whether there is any justification for describing the various rights and duties which may arise in the course of giving judicial effect to a law through the

appropriate procedure as a separate class of rights and duties, is a matter which may be left for future discussion, when we come to deal with the machinery of the law. But the examples given by Austin are not of that type ; they are concerned with substantive law, which alone, hitherto, we have discussed.

We come now to the concept of the legal right.

The legal right That there is a close connection between the legal duty and the legal right, if such a thing as a legal right exists at all, is obvious ; but there are sharp differences of opinion among jurists as to the nature of the connection.

We may begin our consideration of these differences by considering the position of those jurists who deny altogether the existence of the legal right. Perhaps the most prominent member of this school is M. Léon Duguit, whose three lectures delivered before *L'École des hautes études sociales* at Paris on the subject were published in the year 1908, under the title of *Le droit social, le droit individuel, et la transformation de l'État*.⁹ M. Duguit's thesis may be described briefly as, that laws are social rules existing as the inevitable consequences of social solidarity ; they are the expression of its discipline of the individual members of the society to which they belong. Each member has his social function to perform ; the laws of his society are the guides which indicate to him that function ; and, consequently, he is under a duty to obey them. M. Duguit admits that this duty is enforced by social sanctions, because any individual violating

it provokes a social reaction which may take various forms, varying with time and place. But he denies entirely that the existence of the social duty confers upon any individual the power of enforcing the performance of this duty ; because the duty is imposed, apparently in all cases, for the benefit of the community as a whole, and any attempt by one individual to enforce it on another would be an exercise of power over another individual which is not permitted to individuals in a well-ordered society. But neither is the State itself vested with any power to enforce duties ; for M. Duguit strenuously denies, as we have seen, the personality of the State. Confronted with the undoubted fact that, in the French Courts, duties are enforced both by and against the State, M. Duguit treats such a proceeding as a mere form, under the guise of which society itself adjusts the burdens inflicted on its members by the imperfect functioning of its members, if necessary by resort to the public purse, which acts as a kind of insurance fund for the purpose.

It would be unfair to suggest that this thesis of M. Duguit is a plea for State Socialism, much more for Communism, as understood, for example, in Soviet Russia ; for, while he does develop a theory of society as a federation of economic groups, he repudiates with vigour any desire to see a system of class struggle. His theory is a theory of *syndicats fédératifs*, not a theory of *syndicats révolutionnaires* ; and from them, in his view, come the motive powers of the social organism. The State is an organization of opinion ; syndicalism is an association of functions. Sovereignty is a dead myth,

derived originally from Roman Law, and adopted by the 'legists' of the *ancien régime* to justify absolute monarchy.¹⁰

Of this theory, which seems to be derived from the philosophy of Comte and the Positivist School, one can only say, that it appears to be a theory of political science rather than of jurisprudence. Though, as we have contended, Jurisprudence is not a purely formal science, it has to reckon with forms and to pierce to the reality behind them. If, as is the case, it is a familiar phenomenon in modern national communities that one individual should, in the name of the law, and by the agency of the State's officials, be able to bring down upon another who has committed a breach of a legal duty, the sanction attached to that duty, then there exists in the first individual a power to enforce, with the aid of the State, a legal duty. To that power the jurist gives the name of the 'legal right'. And this legal right is not a mere form; it is a reality which, often profoundly, affects the welfare of both parties.

There is another less extreme but powerful school of critics who, while admitting that some legal duties give rise to corresponding rights, deny that this is true of *all* legal duties. Some legal duties, they say, have no corresponding rights; they are 'absolute' duties.

It is probable that this view is largely derived from the more comprehensive doctrine, which we have seen reason to question, that all law is the command, in the last resort, of a sovereign State, or of the sovereign power in a State. The argu-

ment runs, that many legal duties are enforceable, that is, their sanctions are applicable, only at the instance of the State itself, which cannot, logically, be deemed to have conferred upon itself the power to enforce them.¹¹ The fact may be admitted ; there are, in almost all modern legal systems, many duties which are enforceable only at the instance of the State. One very conspicuous example is that important class of legal duties which is imposed by what is known in England as the Criminal Law, in France as the *Droit pénal*, and in Germany as *Strafrecht*. We have seen how, historically, this result came about.* But the inference drawn from it seems to be unwarranted. It is quite true that a legal right, to be effective, must be vested in a definite person, and must have a definite method of enforcement attached to it ; just as we have seen that a legal duty must, to be effective, be imposed upon a definite person or persons, and entail the performance of specific acts or forbearances. But there is no reason to doubt that the power of applying the sanction attached to a so-called ' absolute ' legal duty satisfies these requirements. Even if we take the view that the State is not a legal person (though in some systems this is clearly not the case) we find, as a matter of fact, that, in all modern systems of law, there is a definite legal person to whom the prosecution of criminal offences is entrusted. In England, this is the Crown, which, as we have seen, is a legal person, a ' corporation sole ', or, to be more precise, an official of the Crown, the Attorney-General or the Public Prosecutor. If we go beyond forms, we

* Chapter VI, pp. 124-6.

may even say that any one in England may prosecute for any criminal offence ; because the Crown, subject to certain precautions against ' vexatious indictments ', will always lend its name to a private prosecutor, though only the Crown can withdraw a prosecution once commenced. In France the Minister of Justice (*Garde des Sceaux*), or one of the numerous functionaries of his department, acts as prosecutor ; and similar arrangements are to be found in most Continental countries, some of which at least, also allow the party injured by a criminal offence to bring a civil action to recover the loss which he has suffered from it. Even in England many, though not all, crimes also give rise to civil actions by the party injured ; * though again, the sanction in such cases will not be of a penal but of a remedial or compensatory character.

In view of these facts, it seems like playing with words to deny that so-called ' absolute ' legal duties have corresponding legal rights ; and, where this peculiarity does not arise from the Austinian view of law as the command of a sovereign State, its persistence is probably due to the view, which seems to have been started by Bentham, that a right must be in some way beneficial to the person in whom it is vested. " Rights," says Bentham, in a well-known passage,¹² " are in themselves advantages, benefits, for him who enjoys them. . . . The legislator ought to confer rights with pleasure, since they are in themselves a good " ; and it is urged that the power conferred on the Crown, or a public official, to prosecute for a

* Or, as an English jurist would put it, most crimes, though not all, are also torts.

criminal offence, cannot be considered as a benefit, but rather as a duty. This is, probably, true ; but there is a fallacy in the argument. The right which the public official exercises is conferred by one law, the law which creates the offence for which he prosecutes ; while the duty which he fulfils is created by the law which determines the duties of his office, i.e. Constitutional Law. As regards the criminal, the public official has a right, as regards his official superiors, or the State, he is under a duty ; and there would appear to be nothing inconsistent in a legal right and a legal duty being exercised and fulfilled by the same operation. The position is precisely the same when a trustee sues a stranger to recover property belonging to the trust fund. Against the unlawful possessor of the property, the trustee exercises a right ; for the advantage of the beneficiaries of the trust, he performs a duty by the same act. It is, perhaps, going too far to say, with a writer previously quoted, M. Duguit, that " no one has any other right than ' always to do his duty ' ".¹³ Certainly few legal systems, if any, impose upon the private citizen the duty of exercising all his rights. But the fact that the exercise of a right conferred by one law is imposed by another law upon the person in whom the right is vested, as a duty, is not in the least inconsistent with the existence of the right in question. In truth it presupposes it.

The conclusion appears to be, that the legal concepts of duty and right are correlative ; one implying the other. Apart from purely historical reasons, such as the ' prerogative ' character of the British Crown, which prevents duties being

enforced by ordinary legal process against the monarch, and, in some cases, is quite inconsistent with the peculiarly English doctrine of the Rule of Law, there is no practical difficulty in conferring any legal right, or imposing any legal duty, on any legal person. A legal duty without a corresponding right is unthinkable ; because there could in that event be no effective sanction attached to the duty, and we have seen that a legal sanction is an essential concomitant of every legal duty. Conversely, there can be no legal right without a corresponding legal duty ; for there would then be no sanction and no person to whom to apply it. The one essential is, that the person on whom the legal duty is imposed should be a different person from the person in whom the corresponding legal right is vested. For a person cannot enforce a legal sanction against himself.

Before we leave the subject of legal duties and rights, it will be convenient to discuss one other topic which, though not essential to the existence of either concept, is, as a matter of fact, of considerable importance, both scientific and practical, in the working of legal systems, because it is the basis of one of the most widespread of legal institutions, the institution of Property. This is the topic of the subject-matter of legal duties and rights.

Our analysis of the nature of the legal duty has shown that it consists of an obligation to do or refrain from doing certain acts, and our analysis of the legal right has shown that it is a power of enforcing, through the agency of the sanction attached

**Subject-matter
of duties and
rights**

to such obligation, the doing of or the refraining from such acts. Acts and forbearances may, therefore, be said to be the normal subject-matter of every legal right and duty. But a very large number of legal rights and duties, or, at any rate, the acts and forbearances which they contemplate, are closely connected with some other subject-matter, which goes by the name of 'thing' (*chose*, *Ding*). This word is so common in popular language, that every one assumes to understand what it means. But when we come to look at the part which the word 'thing' plays in the science of jurisprudence, we find that the word, or, at any rate, the concept which it is supposed to represent, is almost bewildering in the many forms which it assumes. The best way of approaching it will be to work from the simple to the more complex of these forms.

There can be no reasonable doubt, that the idea evoked by the original use of the word 'thing' and its equivalents in cognate languages was that of a concrete or material object, perceptible by the senses, not merely for an instant, but continually or permanently, and not only continually or permanently, but continually or permanently as the same object.¹⁴ Thus, such 'things' as oxen or sheep could be recognized by the senses of sight, hearing, and touch as the same objects continually; while occurrences such as a flash of lightning or the impact of a stone on a human body, though perceptible by the senses, were only perceptible for an instant of time, and running water, though perceptible by the senses continually, was not perceptible continually as the same object. No

doubt these distinctions were highly unphilosophical ; but law, as we have seen, had its birth in a primitive age, and long retained its primitive ideas.

Now the value, even to primitive men and women, of material objects such as we have described, is so great, that it is not surprising that their efforts to regulate social relationships (which are the beginnings of all juristic laws) should, at an early stage, be concentrated upon them. Probably the law regarding what may be called purely personal conduct came first ; because that affects those feelings of pain and pleasure which are the earliest matters of interest to sentient beings. Thus conduct affecting his bodily safety and the maintenance of his *mana* or reputation (about which Primitive Man is extraordinarily tenacious) is, doubtless, the earliest to be regulated by social rules. But even primitive men could hardly fail to note how often rival claims to material objects gave rise to exactly that kind of conduct which most directly affected bodily security or reputation—assaults, thefts, even murders. And it is, in fact, rather striking to note how soon, in the earliest recorded legal systems, provision is made for the protection of interests in such objects. Thus, the first two of the famous Twelve Tables of the Roman Law appear to be concerned with what we should now call procedure ; but in the third, the earliest to deal with matters of substantive law, it is obviously concerned with a dispute as to metals, one of the earliest material objects to be regarded as precious by primitive society.¹⁵ And the oldest-known recorded rule of English law, which stands

at the head of Æthelbirt's Dooms, attributed to the sixth century after Christ, is a law dealing with the theft of cattle.¹⁶ Thus it is clear that legal rights and duties begin very early in legal systems to cluster around material objects ; for, though of course the primitive litigant would not look at it in that way, yet the claim of the prosecutor, in a case of stolen cattle, would, in effect, be, that his right in the cattle had been violated by his opponent, who was under a duty to respect it. Thus there can be little doubt that, whatever the economic origin of the concept of property, the legal concept emerged from the recognition of rights and duties affecting material objects.

But a concept of that kind is capable of almost indefinite extension. It is only an arbitrary or customary limitation which restricts it to material objects. As men and women become more capable of abstract reasoning, the more does this arbitrary restriction tend to break down. If there is no concrete material object to which rights and duties can be attached,, there may be objects so like material objects that the necessity for treating them in the same way as material objects makes itself felt. The struggle to secure this treatment is interesting, and not entirely without humour. Running water may not be capable of being stolen ; but something must be done to stop a higher riparian owner diverting it in such a way that his neighbour below is deprived entirely of the benefit upon which he reasonably counted. Hence the beginning of the very interesting law affecting water rights. It may be that coal-gas and electric

current are not material objects; but, in an advanced stage of industrial development, it may be vital to the community to protect those who supply them to the public from being cheated of their due reward. Hence the notion of what German writers call *Dinglichkeit* (' Thing-likeness ') is constantly widening.

Thus, for example, in medieval Western Europe, public offices were treated as property. The King's Judges in France habitually bought and sold their offices in the sixteenth century; and the practice was made legal by the Arrêt Paulette in 1604. Administrative offices in England were equally proprietary in many cases; and the Sale of Offices Act of 1551,¹⁷ which professed to abolish traffic in them, was only partially successful. Yet there was usually no material object over which rights of ownership could be exercised in them. The growth of monopolies following upon the maritime discoveries of the fifteenth and sixteenth centuries, though clearly opposed to the anti-engrossing laws of the Middle Ages, and often bitterly resented, definitely established itself in such instances as ' patents ' for new inventions, copyright, and, ultimately, trade-marks.¹⁸ It is easy to miss the ' ideal ' or ' incorporeal ' character of these ' things ' ; for to many it seems at first sight that the rights and duties which they comprise are exercised over manufactured articles or volumes, which are, of course, material objects. But, in substance, the right of the monopolist is not to manufacture or sell articles or books, but to prevent other people doing so without his permission. The subject-matter of the monopoly

right is the ordinary right of the citizen to manufacture or produce at will ; but this is not a material object, though it is regarded as ' thing-like '.

Finally, though again with hesitation, modern legal systems have come to recognize that even purely personal claims, such as a claim to the payment of a debt, or the fulfilment of a contract, or a share in the profits of a company, can be treated as ' things ', can be made the subject of sale and purchase, and be protected, like true proprietary rights, against invasion by third parties. Doubtless the contractual right itself is a *jus in personam*, i.e. a right which can only be enforced against the other contracting party, by reason of the duty which he has undertaken by entering into the contract. But, as regards outsiders, it is, at least in many cases, treated as a *jus in rem*, i.e. a right which holds good against interference, at any rate deliberate interference, by all and sundry. This is the true mark of a proprietary right, though there are, admittedly, *jura in rem* which are not proprietary. A still wider extension of ' thing-likeness ' is to be found in the interest known as ' good-will ', which entitles the owner to enforce against at least some other persons a duty not to interfere with a mere habit of resort to his services. In some instances, no doubt, this right is connected with a material object, such as a building, though not in all cases ; and it is not a true *jus in rem*, because it can only be enforced against a limited class of persons. But, in English law at least, it is treated as a property right which can be bought and sold.

English law has a curious expression, illogical but useful, for the purpose of distinguishing between 'things' which are concrete material objects ('corporeal things') and 'things' which are only 'thing-like' ('incorporeal things'). It describes the latter as 'things' (or 'choses') in action. The expression is useful; because it emphasizes the fact, that the latter can only be effectively protected by their owners through the medium of legal proceedings; while the former can also be protected by actual possession, or physical control, of their subject-matter, a protection which, obviously, cannot be applied to 'things in action'. But the distinction is really illogical; for corporeal property itself is, in truth, not the subject-matter of rights, but that interest in the subject-matter which is itself a bundle or complex of rights.

In concluding this chapter, reference may be made to a tendency towards extreme extensions of 'thing-likeness' which, it is submitted, is not only unnecessary, but really unworkable. It is sometimes said, that even such rights as rights to bodily safety, reputation, freedom of movement, and the like, are rights which have as their subject-matter the body, or the reputation, of the person in whom they are vested. There appear to be several causes of this tendency. One is, that such rights, like true proprietary rights, are usually *jura in rem*, i.e. enforceable against all and sundry, or, putting it another way, that the duties to which they are correlative are universal duties. That, doubtless, is true; but it does not seem to be a reason for classing together such very different rights as the

right to vindicate one's good name and the right to protect one's land against trespass. Also, a survival of ideas from the days in which slavery was a fully recognized legal institution may have caused a survival of the notion that the human body could be the subject of rights; though in slavery the rights of the owner are not over his own body but over another's. Also, it is an undoubted fact that, in English law, the action of assault is, historically, a variety of the action of Trespass, which was primarily devised for the protection of rights over land.

A more comprehensive cause, however, seems to be, that the discovery that so many rights have, as their subject-matter, concrete material objects, or objects which, by virtue of the extension of 'thing-likeness', are treated as such, has led to a quasi-metaphysical belief that every right must have a subject-matter, more 'thing-like' than the mere performance of the corresponding duty. But that appears to be a quite unnecessary conclusion, suggestive of the old scholastic *tertium quid*.

The extremest extension of 'thing-likeness', however, appears in the expression 'Law of Things' as a title to cover all such parts of the substantive provisions of a legal system as are not concerned with abnormal persons. Thus we get the *jus quod ad res pertinet* of the Roman institutional writers as the whole of the substantive law other than the *jus quod ad personas pertinet*. In Blackstone's *Commentaries*, this distinction reappears under the extraordinary guise of the Rights of Persons and the Rights of Things. The difficulties in which Blackstone found himself when he

tried to make this distinction the basis of his treatise, should be a sufficient warning against the acceptance of it. The distinction which this awkward terminology attempts to express is, of course, between the law affecting normal persons and the law affecting abnormal persons, previously explained.*

* Chapter VII, pp. 144-8.

CHAPTER IX

OCCASIONS OF THE LAW

BENTHAM, whose efforts in the invention of words were always ingenious, though sometimes pushed to extremes, suggested the expression 'dispositive facts' for those happenings which give rise to, transfer, or extinguish rights. He subdivided dispositive facts into (a) 'investitive', those which confer rights, (b) 'divestitive', those which extinguish rights, and (c) 'translative', those which transfer them. One objection to this classification is, that, if taken literally, it would include under the category of dispositive facts the law itself, which is always the ultimate, and often the direct, creator both of legal rights and legal duties; and this seems hardly consistent with Bentham's intention, while far from convenient in practice. Another is, that it seems to omit all reference to that most important characteristic of a right, viz. its capacity, if violated, to bring about the application of a sanction. Dr. Holland suggests as an alternative ¹ 'rights in motion', which certainly draws attention to one conspicuous feature of the phenomena with which both learned authors are attempting to deal, but hardly expresses their essential nature; while, somewhat curiously, he discusses the infringement of rights under the head of 'rights at rest'. It may be

permitted to propose as an alternative the phrase 'occasions of the law' as a comprehensive description of all the happenings which affect the incidence or the enforcement of rights and duties ; and for the following reasons.

The mere enunciation of a law (to use a non-technical term) leaves the person or persons for whose benefit it is intended in a state of what may be called suspended animation. Such a person may be likened to a man who has been given a loaded gun wherewith to defend his house against attack. Until an attack is made on it, he has no need, perhaps no right, to fire the gun. Again, he may desire to vacate the house, and hand over possession to another person, who thinks it necessary, if he is to accept the offer, that the gun should also be handed over to him. Or the first occupant may die, and it may be necessary to find a successor to the occupation and defence of the house. It will be discovered, in practice, that a well-equipped legal system provides for these various requirements, but that, in order to stimulate it to put its provisions in force, it awaits some incident, on the happening of which it will be stimulated into action. These incidents are of various kinds ; but the happening of all of them has the common effect of causing the law to operate, not merely as a passive or potential, but as an active force. Thus they may be described as 'occasions of the law'.

It might, at first sight, appear that the whole of these occasions might be summed up by the expression 'breach of duty'. In fact, a breach of duty does stimulate the law to one very important

kind of operation, viz. the application of a sanction. But such an operation does not by any means cover the whole activities of a legal system, which is concerned, as we have seen, with creating or conferring, transferring, and extinguishing rights; and many, perhaps most, of the occasions of the law which give rise to such activities, are not breaches of duty at all. For example, the invention of a manufacturing process, 'new within the realm', may, if proper steps are taken by the inventor, stimulate the law to confer upon him the valuable monopoly right known as a 'patent'. But it can hardly be described as a breach of duty. Again, the death of a man of wealth may cause the transfer by the law of a vast number of rights, to other persons, his representatives, and, ultimately, to the beneficiaries under his will. Or, finally, the mere lapse of time may extinguish a right, without necessarily conferring it on any person. What precisely will be the effect of any one of these happenings, is a matter dependent on the circumstances of each case. And as some, at least, of these happenings may have the effect either of stimulating the law to apply a sanction or of causing it to create, transfer, or extinguish rights—in other words, may be either a breach of duty or what Bentham would call a 'dispositive fact'—it would seem convenient to attempt some systematic account of their differences and similarities.

In view of the fact that the primary object of the law is, as has been said, to create duties, with their correlative rights, it might seem that nothing less than an exercise of the human will could set the law in operation, and so, therefore, that all the occa-

sions of the law could be discussed under acts and forbearances, both of which imply the exercise of volition. But, even apart from the anomalous case previously discussed,* viz. the purely thoughtless omission to perform a positive duty, it will be found that this is not the case. As a matter of fact, all modern systems of law recognize, as occasions which put the law into operation, events or happenings not caused by the exercise of the human will, or, at least, not by the will of the party to be affected. A striking example is an ordinary contract of insurance. Here, the happening of the risk—the fire, loss of ship, or death—though doubtless caused, in the sense that it was necessarily consequent on previously existing conditions, is certainly not deemed to be the act of the insured; yet it undoubtedly operates to put the law in motion against the insurer. He who was before only under a contingent duty to make good the loss, is now under an immediate and unconditional duty to do so. The fact that the fire was caused by an incendiary, the loss of the ship by a wrecker, or the death of the insured by a murderer, does not make any of these things the act of the insured, unless, of course, his actual complicity is proved. Nevertheless, these events are, as we have said, occasions which stimulate the law into active operation. Another good example of a similar state of things is that which frequently occurs under the English Workmen's Compensation Acts. Here, the accident which arises out of and in the course of the workman's employment, though uncaused by the employer, subjects the latter to

* Chapter II, pp. 35-6.

substantial liability ; the pre-disposing step being the contractual engagement between the employer and the workman. It is noteworthy that, in this case, the step taken to enforce this liability is not described as an ‘ action ’, but as an ‘ arbitration ’.

We require a name for this class of happenings which shall suggest that they are not attributable to any act or forbearance of the party principally affected, and yet that, at the same time, they have a distinct effect in the coming into operation of a law. The word ‘ accident ’ might appear to be most suitable ; but, somewhat significantly, it has about it an air of disaster which is not always associated with happenings of this character. We should hardly, for example, speak of the natural death of an aged man, whereby a charitable foundation became entitled to a large legacy, as an ‘ accident ’. We should probably allude to it as an ‘ occurrence ’, or ‘ event ’ ; and, on the whole, we may perhaps wisely follow Austin in choosing the latter term to express occasions of the law of this kind. We have, therefore, as our first type of occasions of the law, the uncaused occasion, or ‘ event ’, which may have the effect of imposing duties and rights, or, on the other hand, of operating as what Bentham calls a ‘ dispositive fact ’. It is but rarely that an ‘ event ’ operates to impose any criminal liability ; because most systems of Criminal Law attach sanctions mainly to acts, more rarely to forbearances, and, rarest of all, to uncaused events, i.e. events not caused by the accused. But the event of the outbreak of infectious disease may indirectly impose criminal liability upon a householder who

Events

fails to notify it to the sanitary authorities. Still, even here, it is the forbearance or omission to give notice, rather than the outbreak of the disease, that is the occasion of the law.

We come now to the other great class of occasions, viz. those which are caused, or
Acts deemed to be caused, by the persons affected by the consequent operation of the law.

The most important example of these is known as 'acts'; and an act has been defined, with general acceptance, as 'a motion of the body consequent on volition'. With the word 'volition' we enter the realm of psychology, and must be careful not to allow legal usage to be confused with the conclusions of the specialist in mental science. For practical purposes, the law recognizes that the last stage in the exercise of that mysterious faculty known as the 'will' is, in many cases, immediately followed by bodily motion on the part of the person exercising it. This last stage Austin called a 'volition',² which has the advantage of distinguishing it from other exercises of the same faculty which are not followed by similar consequences, e.g. mere unfulfilled desires or conations. Believing firmly that this volition is, in a normal person, the result of deliberation, possibly unconscious, which finally determines the exercise of the muscles of the body, lawgivers have regarded it, when its results are contrary to their purposes, as one of the suitable occasions for the application of sanctions, as well also as for the giving of effect to desires, when these have been regarded as beneficial, or, at least, harmless, to the community. For it must not, of course, be forgotten, that it is not only the

purpose of the State to thwart the desires of its subjects when they are deemed by it to be harmful, but also to further them when they are deemed to be beneficial or harmless. Thus, for example, if a citizen expresses his desires with regard to the devolution of his property after his death in approved manner and form, the State will give effect to them. This is, in effect, one of the commonest of 'dispositive facts'; and it is not without significance that it is known in English law as a 'will'.

It is important to notice, however, the strict limits placed by this generally received view on what may be called the 'extent' of an act; and this for the reason that almost all systems of law draw a practical distinction between an act and the consequences of an act. In common speech, we describe, for example, the breaking of a window by stone-throwing as an 'act'. If the view explained above be accepted, it is the consequence of an act. The movement of the body ceases with the throwing of the stone; the act is the same whether the stone strikes the window or not, though the consequences are different. The question is sometimes posed: whether a person is legally liable for his acts or only for their consequences? The answer is: for both, according to the nature of the offence. In almost all systems there are some acts, the commission of which, whatever the consequences, is unlawful, and entails the application of a sanction. In English law, for example, it is (save in exceptional cases) an illegal act, entailing a sanction, to cross the boundary of one's neighbour's land with-

out his permission, or, at any rate, against his wishes; whether or not the act is followed by material loss to the neighbour. Other well-known examples are the uttering of defamatory words in permanent form ('libel') and the infringement of a monopoly right. Perhaps the best example of all of this class of acts is that known as an 'attempt', which, if its doer contemplates certain consequences, is in itself an offence entailing a sanction, even though no consequences at all should follow from it. On the other hand, the uttering of slanderous words by speech only, though an act undoubtedly looked on with disfavour by English law, does not, in the majority of cases, entail a legal sanction unless loss can be proved as a consequence by the person of whom they were spoken. So also, by that law, the act of excavating in one's own land, which is, as a rule, perfectly lawful, only involves a sanction if damage to one's neighbour's land is the consequence of it. Similarly, by the same law, while storing water in an artificial reservoir on one's own land is a perfectly lawful act, yet if, apart from unforeseeable convulsions of Nature (the so-called 'act of God'), the water, as a consequence, escapes and floods one's neighbour's land, the storer of the water is visited by a legal sanction, and liable to compensate the neighbour for his loss. Clearly, then, a person may be held responsible for acts simply, as well as for consequences of acts.

Turning now to the interesting question: for *what* consequences is the doer of an unlawful act, or an act which he does 'at his peril', responsible, we may note that, broadly speaking, there are two rival theories

**Liability for
consequences**

in the field, both championed by able advocates. One is, that a person is responsible only for such consequences of his acts (and the same rule would seem to apply to his forbearances and omissions) as he either foresaw or must be deemed to have foreseen, because a man of ordinary intelligence would have foreseen them. The other theory is, that a man is liable for such consequences of his acts, forbearances, and omissions, as did, in fact, happen, within a reasonable degree of nearness, or, as it is sometimes put, for the 'direct' consequences, whether he foresaw them, or even could have foreseen them, or not. The controversy between the advocates of these two theories is acute ; and the theories themselves must be examined with some care.

With regard to the first, there can, at least, be no question that almost all modern systems of law make a man responsible for the consequences of certain acts, just because he foresaw them. Jurists express this view by saying that a man is responsible for the 'intended' consequences of his acts. Again, we must not be led astray into psychological problems of the nature of 'intention'. The juristic view was admirably analysed by Austin,³ who explains it as comprising (a) an advertence to the consequence, (b) a desire that it shall happen, (c) a belief that the contemplated act (or forbearance) will bring it about, or at least, an indifference as to whether it will or will not follow from the act (or forbearance). In finding evidence of the existence of belief, the Court will assume, in the absence of contrary evidence, that the doer of the act or forbearance

(unless he is an ' abnormal ' person) had the knowledge and reasoning powers usually found in a person of his station in life ; and it will, probably, after proof of a desire by him that the consequence should follow, refuse to allow him to plead that he did not believe that it would follow from his act. Thus, to take a very simple case, if A raises a gun, which he knows to be loaded, and directs it at B, who falls dead when the gun is fired, A will not be allowed to plead that he did not believe that the bullet would injure B. And, if A were known to have a mortal grudge against B, or, for any other reason, to desire his death, he probably would not be allowed to plead that he did not know that the gun was loaded, or, at least, the plea would be unsuccessful. Such a desire is frequently described as a ' motive ' ; and proof of its existence is often a valuable, though not an essential link in the chain of evidence which goes to prove the commission of an act, and the foresight of its consequences. It is not, however, in itself, a ground of liability.

It is not, of course, as has been pointed out, necessary, in order to entail legal liability, that the consequence foreseen by the doer of the act should be harmful, or, indeed, that any consequences should be contemplated by him at all. A person who inadvertently crosses his neighbour's boundary may not in the least have contemplated doing any harm to his neighbour, or, in fact, have contemplated any consequences at all. He may have foreseen merely that his exercise of his voluntary muscles would bring him on to that particular piece of land, or, he may not even, by reason of darkness,

have ~~seen~~ foreseen that. In either case, he will, by English law, be held guilty of Trespass. A person who, under the mistaken belief that he is selling the goods of A, who has authorized him to sell them, in fact sells the goods of B, who has not authorized their sale, is guilty of Conversion. Both Trespass and Conversion are now, in English law, only civil offences ; but Trespass was, at one time, also, as has been said, at least quasi-criminal, involving a fine to the King. On the other hand, a surgeon who is accused of manslaughter because a patient dies under his hands during the performance of an operation deemed to be necessary for his recovery, has a perfect defence, because, *ex hypothesi*, he did not foresee that his act would cause the death, and, being, *ex hypothesi*, done with the consent of the patient, it was not an unlawful act.

Although, as has been pointed out, intention does not necessarily imply a contemplation of harmful consequence, there is one
 'Malice' variety of it, well known at least to English law, which does so. This is the intention known as 'malicious'. The allegation of 'malice', at one time an element in every criminal indictment in English law, was originally an allegation of an intention which definitely contemplated a harmful consequence. Nor was the allegation confined to criminal proceedings. Though rarer in civil actions, there are still, in English law, certain civil offences in which 'malice' is an essential element ; for examples, the offence of inducing the breaking of a contract by one of the parties to it, the somewhat vague offence known as civil con-

spiracy, and the offence known as 'slander of goods'. Here again, the test appears to be the definite contemplation of harmful consequences as the result of the defendant's act. Still, in the main, English law seems to be inclined to draw a distinction in this respect between intention and malicious intention as the border line between a criminal and a civil offence; for example, in the matter of injuries to (i.e. in respect) of property. Malicious damage to property is a criminal offence; intentional (but not malicious) damage to property ranks, usually, only as a civil offence, or 'tort', even though the damage is 'wilful', as for example in mis-handling of hired chattels. The distinction is not always very clear; but the aim appears to be to stigmatize as the graver offence the act which is accompanied by a contemplation of suffering by the owner of the goods, as compared with the act which contemplates only the advantage of the wrong-doer. The distinction was at one time enshrined in English law in the maxim: *Haud reus nisi sit mens rea*; but the modern tendency to extend the scope of the criminal law to acts in which no contemplation of harmful consequences need be proved, has gone far to make the maxim obsolete. It is, for example, no defence to a prosecution for exposing for sale food unfit for human consumption, to prove that the accused did not know that it was unfit.

So far then, the advocates of the view that a person is only held responsible for such of the consequences of his acts as he foresaw, or might, if of average intelligence, have been expected to foresee, appear to be

**Unforeseen
consequences**

on strong ground ; for if the test of an unlawful act is that the doer of it foresaw, or might reasonably have been expected to foresee, that certain consequences might follow the act, it seems logical that he should be held responsible only for such consequences. But there is a good deal to be said for the alternative view, that a person is responsible also for the consequences of his act, which, though not actually foreseen, or even not in fact foreseeable, by him, did actually follow from the commission of the act, in such a degree of proximity as to be fairly described as ' direct ' consequences. And, as it would appear, each of the conflicting views would apply equally to forbearances as to acts, i.e. to conscious abstentions from the exercise of volition.

It will be convenient to bring the difference of views into concrete form by reference to a recent English case in which the difference was vital, and which has raised acute controversy as to the correctness of the decision in it. This is the decision in the case of *Re Polemis and Furness Withy & Co.*, reported in the year 1921.⁴

The facts were, briefly, that the charterers of a ship employed, in the loading of the ship, certain workmen, who, in the course of their proceedings, ' negligently ' knocked out of a temporary staging in the hold of the ship a plank, which thereupon fell into the hold, and, in some mysterious way, ignited petrol vapour in the hold, and so caused a fire which practically destroyed the ship. The facts were stated by an arbitrator, whose findings of fact the Court was not at liberty to question.

The ship-owners claimed against the charterers, on the well-known principle of *respondeat superior*, for the loss of the ship. There was no doubt as to the 'directness' of the consequences; the case for the defence turned entirely on the argument that no one could have reasonably been expected to foresee such a consequence as the ignition of the vapour from the mere knocking down of a plank. The soundness in fact of the argument was substantially admitted; but the inference therefrom, that the defendants were not in law responsible for the unforeseen and unforeseeable consequence of their servants' acts was denied, and the denial was upheld by the Court of Appeal.

Owing to the special way in which the case came before the Court—on a finding of fact by an arbitrator who did not concern himself with questions of law—it is difficult to know on what rule of law the claimants (the ship-owners) based their claim. But it may be assumed that it was not on contract; for it is tolerably certain that, in that case, the Court would have deemed itself bound by the well-established principle of English law, that a party seeking damages for the breach of a contract is limited in his claim for damages to the 'natural and probable' consequences of the breach, i.e. those consequences which are deemed to have been within the contemplation of the defendant at the time when he entered into the contract.⁵ That there was a contract between the parties in the *Polemis* case is evident, viz. the contract of charter-party; and this contract probably contained some reference to the loading of the ship. Moreover, it appears from the report that

it contained a clause exempting the defendants from liability for damage to the ship from fire ; but the Court took the view that this clause only referred to accidental fire, as distinct from fire caused by negligence, and that the claim was not founded on breach of contract. That the existence between two parties of a contract does not in all cases prevent one of the parties suing the other in tort arising out of the performance of the contract, is also a well-established rule of English law.⁶ But, to do so successfully, the plaintiff must establish the existence of a duty towards him on the part of the defendant independently of the contract, and prove that it has been violated by the defendant.

This is, in fact, what the Court did find in the *Polemis* case. It held that the charterers had, through their servants, been guilty of a 'negligent act', i.e. that they had done something which was inconsistent with the care which, in the circumstances, they were bound by the law on the subject of negligence to show towards the plaintiffs' property, and that the loss of the ship from fire was the direct consequence of that act.

Now leaving aside, for the present, the question whether the expression 'negligent act' is not a contradiction in terms, we may assume that the decision of the Court would have been the same if the fire had resulted from a mere omission of a kind which could be described as 'negligent'—if, for example, the charterers had omitted to provide proper gear for the lowering of the cargo into the hold. The act of the workmen employed was, in fact, pure carelessness ; it was done without any

advertence to consequences at all. It was, in the popular, if not the legal acceptance of the word, an 'accident', though the consequences of it were undoubtedly caused by the workmen's act. In the view of the charterers, the incident was just as little their 'act' as would have been a flash of lightning which had set the ship on fire. In the latter event, of course, the charterers, quite apart from any exception clause in the charter-party, would have escaped liability, on the ground that, if neither party is to blame, 'the loss lies where it falls'.

This was evidently not the view of the Court. Perhaps it did not take the view that the act of the charterers' servants was actionable *per se*, i.e. would have afforded a cause of action even if no loss to the ship-owners had followed; probably, as the scaffolding from which the plank was knocked out is described as 'temporary', it was put up by the charterers themselves, and so knocking a plank out of it would be neither Trespass nor Conversion. But the knocking out of the plank was certainly not an act required for the proper performance of the charterers' work; and, therefore, it was not justifiable. This is, probably, what the Court meant by describing it as 'negligent'. To put a practical test; if one of the ship-owners had actually been present at the time when the plank was displaced, and had foreseen that the conduct of the workmen would lead, if unchecked, to the displacement, he could undoubtedly have protested, and caused the conduct to be stopped. Thus the act was certainly not an 'accident' in the legal sense of the word. That English law, at any

rate, recognizes many acts as entailing legal liability for consequences, though they are in themselves perfectly innocent, is clear from the well-known cases of 'absolute liability' before referred to,* as well as from the equally well-known clause in the Air Navigation Act of 1920,⁷ which, though expressly relieving an airman for responsibility for innocuous trespass for flying at a reasonable height over another's land, yet makes the owner of the machine legally responsible for all material damage done in connection with the flight, without proof either of intention or negligence.

The critics of the *Polemis* decision (which, as a matter of fact, was well supported by precedent) are, therefore, in this position. They must admit that the charterers' workmen did what they ought not to have done; for they concede that for ordinary damage done by the fall of the plank the charterers would have been liable, whether the workmen had foreseen it or not. Further, they would probably not deny that, if the workmen had actually contemplated the destruction of the ship by fire as the result of their act, the charterers would have been liable. But because, they say, the workmen contemplated neither the ordinary nor the extraordinary consequences of their unjustifiable act, the loss is to fall on the shipowner. Is there any ground for saying that there is such a difference between intention and negligence as the ground of a civil action? Does not mere speculation (for it can be little more) as to what a man might have foreseen if he had set his mind to a task to which he did not, in fact, set it, lead to rather

* P. 196.

unsatisfactory results in practice? If once it is admitted that an act or omission (not arising out of a contractual undertaking) is a cause of action at all, i.e. is a breach of duty, there seems to be no ground for excusing the person guilty of it from responsibility for all direct consequences, whether or not he foresaw them or could have foreseen them. Why should the innocent person suffer instead of the guilty? It is submitted that in the directness of the consequences lies the justification of the decision in the *Polemis* case, and that herein it differs from the two cases which, it is suggested by Sir Frederick Pollock,⁸ are inconsistent with it. For in the *Polemis* case there was no *actus novus interveniens*, while in both *Cox v. Burbidge*⁹ and *Sharpe v. Powell*¹⁰ there was—in the former the straying of the child on the road, and in the latter the leading by the plaintiff of his horse over the street. In the *Polemis* case the explosion followed instantaneously on the doing of the 'negligent act'.

We come now to consider forbearances and omissions as occasions of the law, whether as breaches of duty entailing a sanction, or as 'dispositive facts'. In theory, the two classes of occurrences differ substantially. A forbearance involves a conscious advertence to a particular course of action, and a conscious refusal to adopt it. An omission implies inadvertence with regard to a given course of action, and a consequent but unconscious failure to adopt it. Forbearances have from a very early stage in legal evolution been desired by the lawgiver—in substance, all 'taboos' enjoin forbearances, as do most of the earliest laws

**Forbearances
and
omissions**

of the State. It is assumed that the persons to whom the laws are addressed will be inclined to do certain acts which are deemed reprehensible—eating forbidden food, robbery, murder, and the like ; and, to dissuade them from such conduct, the law imposes a sanction upon the doing of them. But the connection between a mere inadvertent omission and a sanction which is supposed to control a desire is not very clear. Finally, there is the practical consideration that it is far easier for the State, with its overwhelming physical force, to prohibit the doing of acts which it dislikes, than to secure the doing of acts which it desires to have done. So that, while omissions were probably punished in quite early times by the primitive tribunals of the village, the gild, or the manor—indeed the word ‘ negligence ’, i.e. unlawful omission, is said to be derived from shirking one’s duty in the harvest field (*nec-ligere*)—it was not until the State hit upon the ingenious idea of making a person pay pecuniary damages as compensation for an omission, that the modern offence of Negligence became at all prominent. And, even then, it was until recent times, rare for the State to punish directly the offence of mere omission. A somewhat curious testimony to the truth of this view has recently come to light, mainly in connection with motoring offences resulting in injury to human life. The jury will be apt to find a verdict of ‘ Negligence, but not criminal negligence ’, meaning thereby inadvertent omission to take care, as opposed to deliberate forbearance to take care. This saves the offender’s skin, but leaves him open to be sued in a civil action. Finally,

forbearance implies intention, mere omission does not; and we have already seen that intention plays a large part in the concept of guilt.

Nevertheless, so far at least as civil liability is concerned, forbearances and omissions are treated as much on the same footing. It matters little to the creditor whether his debtor's failure to pay his debt is due to forgetfulness, inability, or defiance. The same thing is true of a failure to perform an ordinary contract or to perform one's duties as a trustee; even *in foro conscientiae* the Chancellor does not care very much whether the failure is wilful or merely forgetful. It is, as a rule, only the Criminal Law which punishes 'wilful negligence' as distinct from 'negligence'; and this really means that it punishes forbearances, but not unintentional omissions. It is the theory of the *mens rea* over again.

Modern definitions of Negligence, to which it is proposed to refer later, are usually, in form, negative. But those who are familiar with 'Negligence' the history of the English Law of Contract are well aware that in the early development of the offence of Negligence in that law, acts played a more prominent part than mere omissions. In fact, long before a mere failure to perform an undertaking, or *assumpsit* ('non-feasance'), entailed a liability to pay damages, both 'malfeasance' and 'misfeasance' were recognized as grounds of an action framed in negligence. 'So negligently he did his task, that the plaintiff's horse was maimed' (or drowned). It was not until some hundred years after the '*tam negligenter*' actions had been allowed for mishandling,

that mere omission to perform an undertaking was recognized as a ground of action ; and then, with the recognition that a mere failure to perform a ' simple ' contract fortified by valuable consideration was itself a civil offence, the allegation of negligence disappeared in such cases—in fact, for a long time, from the pleader's form-book altogether. It seems, therefore, impossible to deny, historically, that an allegation of Negligence may be based on an act ; and that, in practice, it may be so based at the present day, is clear from the *Polemis* case recently discussed.

It is, probably, then, rather misleading to define Negligence, as is commonly done, as ' absence of that care and skill which the person alleged to be negligent was under a duty to manifest, in the circumstances, towards the person alleging negligence '. The desire is, obviously, to rule out the intentional act ; and it seems quite possible to speak of an ' unintentional act ', and regard it as evidence of Negligence. But it is submitted that even an intentional act may be evidence of Negligence, e.g. if a physician, administering a powerful drug to a patient, takes no steps to ascertain whether there is anything in the patient's state of health which renders the administration of the drug dangerous. The fallacy lies in the use of the word ' intention ' in the two cases in different senses. If we say that an intentional act will entail, for example, criminal liability, while an unintentional act will not, what we really mean is, that an act done with an intention of doing harm will be criminal, while the same act done with the intention to do good will not.

As has been previously remarked, with the appearance of the simple contract and the trust as independent institutions in English law, cases of 'pure' negligence fell into the background in the English Courts for some three hundred years ; and it was not until the late eighteenth century that they became again frequent in the Reports. Then the remarkable development of mechanical inventions led to the appearance of cases for which the older categories of the Law of Torts made no provision, but for which the Courts found room under the expansive cloak of the action of Case. Many, if not most, of these were based on the alleged want of care shown by the defendants in the handling of buildings, or of potentially dangerous articles ; whereby harm had accrued to the plaintiffs. Quite naturally, they were classed as Actions on the Case for Negligence, or, more briefly, Actions of Negligence. But an eminent jurist, the late Professor Geldart, whose untimely death deprived the juristic world of what would have been work of great value, steadily maintained that there was no such thing as an Action of Negligence.¹¹ All torts, he urged, were based either on intention or on negligence ; and it was no more logical to have an Action of Negligence than an Action of Intention. The argument is ingenious ; but the answer would appear to be, that the older actions in tort, which were based on intention, such for example as Trespass, Detinue, Defamation, Malicious Prosecution, and the like, had been given specific names, while the newer actions, based on negligence, had not. Had the English Law of Torts taken the bold line of saying that any person who intentionally or

negligently causes harm to another is liable to an action for damages, as do more than one of the Continental Codes, Professor Geldart's argument would have been well-founded. That is, for example, what the famous article 1382 of the French *Code Civil* ('Napoléon') does when it says, that "every act (*fait*) by which one man causes damage to another obliges the person by whose fault (*faute*) the damages occurs, to make reparation for it". Unfortunately, the English Law of Torts cannot be reduced to such a simple formula.

The use by the *Code Civil* of the word *faute* naturally suggests another famous controversy which has arisen in connection with the definition of negligence. Does negligence imply a state of mind, or merely a state of body? Or, as it is sometimes put, is it objective or subjective? In other words, can a person who has really done his best be held liable for 'pure' negligence, i.e. negligence not being simply a failure to perform a contract, or, possibly, to execute a trust? In English law, the answer is undoubtedly in the affirmative. For the Law of Torts has been moulded on common law principles; and the Common Law has an inveterate habit of adopting objective standards, probably owing to its having had, very largely, to work through the jury-system. Accordingly, its test of negligence is whether the person accused manifested that degree of care and skill which is applied by the average careful and competent person in similar circumstances. If he did not, then, however scrupulously he tried to do his best, he will be liable for negligence if harm follows to his

Is 'negligence'
a state of
mind as well
as body?

neighbour. Thus, if a motorist is driving with the utmost care, but stupidly steers to the right when he intended to turn to the left, and so knocks down a pedestrian, he will be held liable. The argument of the law probably is, that he ought not to have been driving if he could not drive better. It seems, therefore, impossible to say that common law negligence implies a state of mind. The crucial test would be, whether a superlatively skilful person, who, through indifference or haste, though reaching the average standard of performance, fell below his own, would be liable for damage which would not have happened if he had done his best. It is suggested that, in such a case, he might be held liable for intention, but not for negligence.

The case of the trustee, before alluded to, is more doubtful; for the Law of Trusts has not been developed in the Common Law Courts, but in the semi-ecclesiastical atmosphere of the Chancellor's jurisdiction. Moreover, though a trust is not, technically, a contract, it has a good many of the features of a contract. It is said that, about a quarter of a century ago, an eminent and justly respected financier, awakening suddenly to the unpleasant fact that he had, out of pure good nature, become a trustee of something like three hundred marriage settlements, consulted an equally eminent Equity counsel (afterwards called to the highest judicial office) as to whether he (the financier) was legally bound to devote to the duties of each of his trusteeships the same care and skill which he gave to his own financial business, and that the opinion given by counsel was in the affirmative. Such an opinion, if correct, would, of course, by parity of

reasoning, imply that an ignorant and unskilful person in a similar predicament would not be required to show more than his own best—*sua diligentia*, as the Roman Law put it. For, if a man does his best, he satisfies his conscience, and that was the test of the Chancellor's jurisdiction.

It will have been observed, that the English legal definition of 'negligence' implies that the care or skill required is to be directed towards a given person. A plaintiff in an action of 'pure' negligence must allege that the defendant has failed in the care and skill which he owed towards him (the plaintiff), i.e. he must set up a certain relationship between himself and the defendant, out of which the duty to take care arises. This fact was brought out with great clearness in the *Palsgraf* case,¹² which Professor Goodhart discusses in the volume in which he criticizes unfavourably the decision in the *Polemis* case.¹³ In the *Palsgraf* case before the New York Court of Appeals in 1928, a railway guard, in assisting a passenger to board a train, knocked a package from the passenger's arms. A violent explosion followed; the package having contained fireworks, of which fact the guard was ignorant. The concussion knocked over some scales standing a considerable distance away; and, in falling, they injured the plaintiff, who was an intending passenger. The Court of Appeals, by a narrow majority, decided against the plaintiff's claim to recover from the railway company for the injury. Professor Goodhart takes the view,¹⁴ that this decision is inconsistent with the *Polemis* decision, and that it is right. In the latter view we

**Negligence is
relative**

may agree with him, but not in the former. The weakness of the plaintiff's case in the American court was, that circumstances had not set up that relationship between the railway guard and herself which imposed on the guard a duty to take care *towards her*. To use the language of the older cases, he had not 'assumed upon himself' (*assumpsit super se*) to assist in her affairs. As the Chief Justice, who was of the majority of the Court, expressly said: "Negligence in the abstract, apart from things (and, *semble*, persons) related, is surely not a tort, even if it is understandable at all."¹⁵ But in the *Polemis* case there was just that relationship between the charterers and the ship-owners which imposes the duty of care. The Court, in the *Palsgraf* case, did not, it is believed, suggest that the passenger whom the guard did assume to assist would, if in fact he had been injured, have been without redress, allowing, possibly, for a plea of 'contributory negligence'.

This chapter, though already somewhat long, can hardly end without reference to the important element in the doctrine of legal negligence suggested by the last phrase.

'Contributory' negligence

A common defence to an action of Negligence is the plea of 'contributory negligence', i.e. an assertion that, while the defendant's negligence is admitted, it was not the cause of the plaintiff's loss, which was really caused by the plaintiff's own negligence, or, as it is technically put, that the defendant's negligence was not the *causa causans*, but only the *causa sine quâ non*, of the plaintiff's loss. Again motoring cases furnish a ready illustration. A is driving carelessly at night along a

public road. B, a pedestrian, instead of walking along the footpath provided for pedestrians, is walking along the road, and, the night being boisterous, does not hear the approach of the car behind him, and is knocked down by it and injured. Which is the real cause of the injury, the carelessness of the motorist, who, if he had been keeping a good look-out, would have seen the pedestrian and avoided him, or the rashness of the pedestrian, who, being presumably aware that motorists might be using the road, left the safety of the footpath? Such cases are often very difficult to decide; and, as a rule, the plea of contributory negligence succeeds, unless the plaintiff can show that he had reasonable justification for doing what he did, or not doing what he left undone; because his act or omission is, at any rate, the proximate cause of the damage. The English common law rule is not ideal; for it casts the whole of the loss on the person who was, at the most, only partly to blame. Other jurisdictions apply a humaner principle, viz. of dividing the loss according to the proportion of the blame, or, if the blame cannot be apportioned, then equally between the parties.

In conclusion, it may be permitted to remark, that there seems to be no reason why the principle of contributory negligence should not also be applied to intentional acts involving liability. If, for example, A has lost by theft a valuable ring, and B, knowing of his loss, deliberately acts in such a way as to induce A to believe that he (B) has stolen it, so that, if A prosecutes him for theft, he may be able to bring an action for malicious prose-

cution against A. Or if A, suspecting that B is about to send a libellous letter to him through the post, asks a friend to open his (A's) letters for several days, in order that there may be sufficient evidence of 'publication' to enable him (A) to bring an action for damages against B. It is possible that, in both cases, the trick would be fatal to its author's chance of success. But the phrase 'contributory intention' has not yet made its way into legal language.

CHAPTER X

MACHINERY OF THE LAW

HITHERTO we have been considering the State's law as a substantive force only, i.e. as the expression of the will of the community with regard to the conduct of its members and of those who, for the time being, find themselves within its territory. Even the sanctions of the law, which we have discussed, may fairly be regarded as part of the substantive law ; though possibly they are rather near the border line which separates it from the side which we are now to consider, viz. the ' adjective ', or, as it is more conveniently called, the ' procedural ' side of the law. This is, naturally, of less interest to the average citizen than the substantive law ; because, in a well-ordered community at any rate, while the mass of the citizens must steer their daily courses, consciously or unconsciously, by the substantive law, it is only in comparatively few cases that they are personally interested in the details of legal procedure. But, to the practising jurist, these details are of great importance ; because he is, or, at least, hopes to be, in daily touch with them, and must understand them thoroughly. To the student of Jurisprudence they are also of great interest.

It is sometimes too hastily assumed, that the whole of adjective or procedural law is concerned

with litigation, i.e. the adjustment and enforcement of legal rights and duties by the officials of the State ; and, of course, by far the most spectacular part of that law is the part which is applied in the Courts of Justice, the prison, and the police station. But, as every practising jurist knows, there is a vast amount of legal procedure which takes place in the barrister's chambers and the solicitor's office, which has no immediate connection with litigation or the Law Courts, and is yet of fundamental importance for the practising jurist. To this side of procedural law the general name of ' Conveyancing ' is usually given in England ; but the name is not very accurate as a description of such important functions of the practising jurist as giving advice or opinions on legal questions, drawing up partnership deeds and articles of association and other documents connected with the formation of companies, assisting in the administration of the estates of deceased persons, and other items of non-litigious legal business, involving vast personal and pecuniary interests. Moreover, there is a very considerable part of legal procedure in this broader sense, which is not conducted by professional jurists at all, e.g. the drawing up of such familiar commercial documents as cheques and other bills of exchange, bills of lading, charter-parties, and insurance policies. And, though a journalist naturally finds the proceedings in a Court of Law more attractive material for his pen than the placid atmosphere of a ' conveyancing ' office or a mercantile exchange, it may be suggested that even scientific writers on jurisprudence have been too apt to ignore this

less spectacular side of adjective or procedural law.

For example, most modern systems of law require that all alienations of property in land, other than leases for very brief periods, shall be embodied in writing, usually accompanied by some further guarantee of genuineness or publicity, such as sealing, notarial act, or entry in an official register. This requirement is not, as a rule, a mere question of evidence, but a test of validity—without it, the attempted alienation is invalid. In addition, in numerous cases, attestation by witnesses—sometimes by official witnesses—is required. Other rules of modern law go further, and actually prescribe the precise form in which certain transactions, in order to give them legal force, must be effected. A striking example is the contract of marriage; but, in many less important matters, such as bills of exchange, insurance transactions, mortgages of chattels which remain in the possession of the mortgagor or borrower, money-lending contracts, there are strict rules as to the forms which must be followed if the transaction is to have the legal effect desired. Requirements of an equally stringent character govern, in most countries, the transfer of property in ships, or shares in ships. Quite naturally, owing to the immense practical importance of these various transactions, each of them is made the subject of specialist treatises, written from the standpoint of the practitioner. One of the best-known professional treatises on any branch of English law, the work of the late Lord Blackburn on *The Contract of Sale of Goods*, actually begins with a discussion of the

famous section of the Statute of Frauds which lays it down that no contract for the sale of goods of the value of £10 or over, shall be deemed to be good unless it is evidenced by writing. This can hardly be deemed a satisfactory way of enabling the reader to understand the nature of a sale of goods ; but it is emphatic testimony to the importance, in the mind of an eminent practitioner, of the observance of non-litigious procedure. There would seem to be no doubt that, if we look at the matter from the rational, rather than the traditional standpoint, these rules of form are as much a matter of procedural law as any rules for the conduct of litigation in a Court of Justice.

It is, however, as has been said, the part played by the State in enforcing the sanctions imposed upon the breakers of the law, which is the most prominent part of the machinery of the law ; and to that we may now turn.

This part sub-divides again into two sections, the judicial and the executive. The former is concerned with ascertaining whether, in a given case, the law has been broken, or is likely to be broken ; the latter, partly, as in the matter of Criminal Law, with putting the machinery of the law in motion, and, in both Criminal and Civil Law, with giving effect to the decisions of the Courts. It is, therefore, somewhat difficult to know whether to choose for first treatment judicial or executive machinery ; but, inasmuch as the former is probably the older, it may be the more convenient course to deal with it first.

**Judicial
procedure**

The essence of the judicial function is, as has

been said, to declare whether the law, in a given case, has been broken, or is likely to be broken (*jus dicere*). It pre-supposes the existence of a doubt on this question as regards two definite persons ; to involve a judicial decision there must be, as it is said, *lis inter partes*. There must be one party who asserts and another who denies a breach by him, or an intended breach, of the law ; and the function of the judge is to decide which is right. The fact that, in Criminal Law, one of the parties is an official of the State, as is also, in all modern systems, the judge, is, or should be, immaterial ; but any attempt on the part of the judge to combine the functions of the prosecutor with those of the judge is, at any rate according to English ideas, fatal to the administration of justice.

Moreover, any attempt on the part of the judge to anticipate the probable fate of a case which has not yet arisen, even in countries in which the doctrine of judicial precedent is accepted, is looked upon with suspicion, and treated as a mere *dictum*. In certain rare cases, English judges have, either at the instigation of the Crown, or of their own motion, passed certain resolutions, as it were *in vacuo*, expressing their views as to the conclusions which ought to be arrived at by the Courts in a certain class of cases which are likely to arise in the future ; such, for example, as the ' Resolution in Anderson ' in 1592,¹ concerning Habeas Corpus cases, and the *McNaghten* rules, in 1843,² on the subject of lunacy as a defence to a charge of crime. But, again, both popular and professional feeling has been against the practice, as confusing the function of the judge with those of the legislature or

the executive. And when the Ministry of the day, in a measure which it brought recently before Parliament, actually included a clause requiring the judges to answer enquiries by a Government department as to the interpretation likely to be put upon the measure after it became law,³ there was an outburst of indignation, not only among the laity but among the judges themselves, which caused the withdrawal of the offending clause. To the Minister in charge of the measure, and his officials, who, in all probability, genuinely intended by the proposal to avoid the cost and delay of heavy litigation, the protest may have seemed pedantic; but it may be hoped that subsequent reflection convinced them that Montesquieu was profoundly right when he claimed, that it was of the essence of good government that the judiciary should be entirely independent of the executive.

The reason is not far to seek. If it be admitted, as it probably will be, that complete impartiality is a vital part of the judicial function, it should also be realized what a very difficult acquisition impartiality is, and how easily it is lost. Deep down in human nature lies the primitive herd-instinct, which, almost irresistibly, impels a man to 'take sides' in a quarrel with which he is brought into contact, and to be influenced in his choice by all kinds of irrelevant sentiments, which, in some cases, he is quite unable to put into words, but which are a part of his unconscious inheritance from the past. It may be added, that impartiality is a quality by no means likely to increase the popularity of the person who evinces it, save with

exceptionally thoughtful persons ; in the words of a well-known quip, justice is ' just ice '.* Consequently, it should be one of the chief aims of a judicial system to exclude from the minds of the judges all influences which would be likely to arouse these irrelevant sentiments. That is, of course, one of the chief arguments against the choice of judges by popular election. For, if the election represents the genuine choice of the electorate, and is not the result of mere wire-pulling, the judge will probably be chosen for his popular sympathies, and will give effect to them ; for example, expressing his indignation at a horrible crime by convicting (or procuring the conviction) of an accused person against whom the evidence is weak. But what if the victim happens not to be the guilty person ?

Considerations of this kind have led legislators and statesmen to adopt various plans for the selection of judges, to choose them from different classes of persons, to give them different kinds of tenure of office and standards of remuneration, to impose upon them certain restrictions with regard to their non-judicial* activities. The limits of this work do not permit of a detailed discussion of these various aspects of an important subject ; but it may be possible, by a rather severe process of synthesis, to bring into prominence the salient

* There is a well-authenticated story to the effect that an eminent ex-Judge, sent over to a neighbouring island to compose the differences between two jarring sections of the native community, as he was leaving the room after the first session of the enquiry, heard one of the disputants remark, " This is a queer sort of chap. He seems neither to be on one side or the other."

features of the chief types of judges now to be found in the legal systems of civilized States.

We may be pardoned for taking first a peculiarly English type, which is to be found, not only in England, but in the higher Courts of

**The forensic
judge**

the United States of America, and in most of the Courts of the self-governing Dominions of the British Empire. This type may be called, for want of a better name, the 'forensic'; because it is recruited almost invariably, and, usually, in pursuance of statutory directions, from the ranks of successful advocates. For this reason it is highly remunerated, therefore costly, and, therefore, comparatively small in numbers. For the same reason, though not for that reason only, it is given security of tenure; and the positions of its holders are not likely to be materially affected by the favour or disfavour of the executive government. Practically, the only reward which the Executive can offer to a judge of this type of whom it approves is promotion, within a very limited scale, to a higher Court, which does not always involve an increase of remuneration; while it can do little to harm a judge whom, for any reason, it dislikes. The results of this type of judicial organization are well known. The judges, while undoubtedly subject, in law, to the control of the supreme legislature, and liable to have their decisions overruled, so far as their precedent value is concerned, by subsequent legislation, are really independent of the executive power, and, in times past, have, undoubtedly, stood between the Executive and the private citizen as a shield and buckler for the latter. They have

secured the almost complete confidence of their communities, not only in their integrity, but in their fairness, their diligence, their skill, and their impartiality. On the other hand, there is, from time to time, a good deal of criticism of the slowness of the system and the cost of litigation conducted under it. The former fact is, undoubtedly, due to the smallness of numbers of the judges in such a system, which, again, is due, mainly, to the fact that they are highly paid ; the latter charge is mainly due to the desire for thoroughness which the system manifests, and to the unwillingness to forbid persons, with, perhaps, vital personal or pecuniary interests at stake, incurring expense which, they are persuaded, will be likely to ensure success. It would be quite simple to provide that, in no case, should the costs of a successful litigant be imposed upon his opponent beyond a fixed maximum ; but that would not prevent keen litigants incurring heavy costs at their own expense. The only effective answer to this criticism would be to place a rigid limit on all expenditure incurred in a lawsuit, as in the case of a Parliamentary election. But for this drastic step probably no community is prepared.

The second type of judge is that almost universally to be found in the Continental States of Western Europe. We may call the type that of the 'official judge', a person who, from the commencement of his professional career, devotes himself to the work of judicature, unlike his English-speaking colleague, who proceeds to the Bench only after many years of practice at the Bar. After an

**The official
judge**

academic training and a short apprenticeship as assessor or assistant to an older colleague, the future official judge definitely enters the ranks of the judges ; naturally beginning with a Court doing only small business, and gradually working his way to larger spheres or to a higher rank in the judicial hierarchy. Compared with those of English and even of American and Dominion judges, his stipend, even in the highest tribunals, is small ; it compares also unfavourably with the income of a moderately successful *avocat* or *Rechtsanwalt*. In France such judges are, at any rate in theory, *inamovibles* ;⁴ and, by Article 104 of the German Constitution of 1919, all judges, except the lowest, are to be appointed for life, and are not to be dismissed except for breaches of the law, confirmed by decisions of the ordinary Courts. But it is obvious that a judge whose career normally depends on promotion by the Executive, even though there is, in theory, a regular system by which promotions go, at least partially, by seniority, cannot so completely ignore the wishes and influence of the Executive, as do judges of the first type. It would hardly be fair to describe judges of the type under discussion as members of a bureaucracy ; but it is tolerably clear that they do not occupy the same independent position towards the Executive as do the forensic judges. And, though some of them, e.g. the members of the *Cour de Cassation* and the *Conseil d'État* in France, and of the *Reichsgericht* in Germany, have shown marked independence in some cases, this may be accounted for partly by the fact that, in these high tribunals, the judges are drawing towards the end of their careers, and partly by the

fact that, in the *Cour de Cassation* at least, some of them have, contrary to the general Continental rule, formerly been distinguished advocates.

On the other hand, it seems to be admitted that the cost of litigation in Continental countries is substantially lower than in England, and even than in the United States and the British Dominions. This is probably, in part, the result of the greater number of the judges, and their consequent dispersal all over the country, and in part of better arrangements as to professional charges, in which a maximum percentage of the value involved is frequently prescribed. This rule is said to prevail also in some cases in the British Dominions, where, however, it not infrequently produces results which make even successful English practitioners somewhat envious.⁵

The third type of judge may be described as the 'lay' type. Though it exists in other countries to a very limited extent, the chief example of it is to be found, alongside of the forensic type, in Great Britain, most conspicuously in England. Judges of this type in England are known as Justices of the Peace (or, more popularly, 'magistrates'); and they have a history almost as long as the forensic judges of the first type. At first created as purely executive officials ('Keepers of the Peace'), they were invested, during the fourteenth century, with large judicial powers, most, though not all, of which still remain. Broadly speaking, all serious crimes, with a few exceptions, are triable by them in Quarter Sessions of the county,⁶ and all petty criminal offences in Petty Sessions, subject to a

possible re-hearing before Quarter Sessions in most cases. In addition, in their individual capacity, Justices of the Peace conduct the preliminary enquiry as to whether a person accused of an indictable offence should be committed for trial by a Court and jury, either at Quarter Sessions or at the county Assizes. Concurrently with these judicial and quasi-judicial duties, the Justices of the Peace were increasingly burdened with a vast quantity of purely administrative functions, such as the fixing of wages under the Statutes of Labourers, the binding of apprentices under the Apprenticeship Acts, the supervision of the Elizabethan Poor Law system, the granting and revoking of liquor and other licences, and the enforcement of road repairs. The County Justices were even entrusted with the making and enforcing of rates. The administrative duties of the Justices of the Peace were largely, but by no means entirely, transferred to representative County Councils in 1888 ;⁷ but it is difficult to doubt that the administrative traditions of their office still, to some extent, colour the views of the Justices.

The two striking features of the office of Justice of the Peace in England are (1) that no legal attainments, even of the simplest kind, are deemed to be necessary for its occupants, and (2) that the office carries no stipend. For a long time a County Justice had to show certain property qualifications, which practically kept the office in the hands of landowners ; but in the cases of such chartered boroughs as had Justices of their own, no property qualifications were necessary, and the property qualifications of County Justices were abolished

some years ago.⁸ Consequently, the office is now sought, as a source or symbol of dignity and influence, by minor politicians of the party kind, in reward for political services; and certain well-intentioned recent reforms in the selection of Justices have, it is to be feared, rather increased than diminished this tendency. The view now appears to be, that if the balance of parties on a county or borough Bench can be kept fairly even, that is the ideal arrangement, quite regardless of the question whether the small party-politician is a suitable incumbent of an office which requires above all things, for its proper fulfilment, complete impartiality, strict observance of evidence, and absence of social and political prejudices. It is somewhat odd, that, while the tendency to reward more important political services with High Court judgeships, after being, with rather disastrous results, revived towards the end of the nineteenth century, has now almost entirely died away, a similar tendency should increase in the appointment of Justices of the Peace. It should be stated, however, that the tenure of the Justices, though nominally only 'during pleasure', is, in substance, never revoked except for misbehaviour or neglect of duty.

Magisterial administration of justice in England has recently been made the subject of severe criticism in a work entitled *English Justice*, by "Solicitor",⁹ published in 1932. Too much attention must not, of course, be paid to anonymous attacks. But there are obvious reasons why a solicitor, in writing a work of this kind, should withhold his name; and it is only fair to say that,

in dealing with this part of his subject, the author of the work in question shows a familiarity with it which leads a reader to believe that he is writing from personal experience as well as from other trustworthy evidence. The chief points of his attack are the undue deference shown by the ordinary Justice to police evidence and police authority generally, and the almost inevitable tendency for a Court of laymen to accept the rulings of its clerk, who is, in theory, merely its clerical official, on all matters of law and legal procedure. These accusations have at least an air of plausibility ; for they are just the kind of defects which would be expected in a lay tribunal consisting, not infrequently, of persons of somewhat limited intellectual training. On the other hand, the principle of associating the layman with the expert in the administration of justice is thoroughly sound. The pity is that it is so inadequately carried out in the Justices' Courts.

There are, of course, many questions of juristic interest in connection with judicial functions which deserve serious discussion, such, for example, as the question of 'collegiate' as contrasted with single Courts (i.e. Courts comprising several or only one judge for the hearing of a case), of the number of appeals permitted, of the comparative advantages of a centralized and a localized judiciary, and the like. But space permits only the treatment of one important but often overlooked feature of the judicial function.

A person who is acting as a judge has, in the large majority of cases, to perform two distinct tasks. He has, assisted it may be, by a jury, to discover

the relevant facts, and then to apply the law to those facts. Most judges of experience find the former the harder task, and welcome the 'case stated', or an agreement by the parties as to the facts, as relieving them of more than half their difficulties. The problem of proof is very old in judicial history; and it is tolerably certain that, for long after the primitive moot had accustomed itself to pronounce on the law of a dispute, it shrank from any direct pronouncement as to facts. The form of the old popular 'doom', so far as it can be reconstructed from the fragments which have survived, comprised three elements, viz. (1) a statement of the wergild or fine appropriate to the alleged offence—'Bishop's cattle eleven fold', (2) a statement of the onus, or benefit, of proof—'the oath is nearer to A' (probably dependent on some obvious and striking fact, e.g. that the beast in question was found in the byre of the accused party), and (3) the mode of proof—'let him go to the water'. Proof was deemed to be too difficult a matter for human agency, and took one form or another—oath, ordeal, or combat—of appeal to the Higher Powers², to indicate the guilty party. But even the oath was not, as it is in modern proceedings, to definite facts seen or heard by a witness, but a mere general asseveration as to the innocence or guilt of the accused, by a number of his kinsmen or neighbours varying with the circumstances in the case ('compurgation' or 'clearing oath').* We get a little nearer to modern notions

* The form in such a case would be in the 'doom': "Let A make his law six-handed" (alluding to the raising of the hand by the 'oath-helper').

of evidence with what are called the 'transaction witnesses', i.e. the persons in whose presence a sale or pledge was formally carried out in accordance with law, and, somewhat later still, a sealed document or tally which virtually settled the case. But all these are what an eminent writer on the early history of proof calls 'pre-appointed evidence'. It was not until the belief in miracles to order began to decline—in particular, when the Western Church forbade the clergy to take any further part in judicial ordeals in A.D. 1216—that the Courts in Western Europe began to face up to the modern theory of evidence, i.e. a scientific attempt to balance the probabilities in the face of facts testified to by witnesses. The association of proof with supernatural safeguards is, of course, still shown in the oath taken by the average witness; and, in England at any rate, perjury of witnesses remained a purely ecclesiastical offence until the sixteenth century.¹⁰

Meanwhile, the disappearance of ordeals had left the Courts of Western Europe in a dilemma as to the proof of facts, especially in the
Evidence new criminal law which was being administered by the State tribunals. It was at this point that English criminal law began to diverge completely from its Continental contemporaries, and, in spite of its barbaric penalties, to evolve a procedure which was comparatively humane. For, while the Continental Courts, doubtless influenced partly by the example of Roman Law, adopted what is known as the 'inquisitorial' system, the great object of which is to make the accused convict himself by confession, English law adhered to

the 'accusatory' system, in which prosecutor and accused are combatants and the successful combatant wins. In practice, the inquisitorial system meant the habitual use of torture, or the 'question'; for, naturally, an accused person would not be likely to confess without pressure being put upon him, knowing that a confession would mean death. On the other hand, the peculiar institution of the jury, which had made great way in England since the Norman Conquest, and was already in use for accusatory purposes (the 'Grand Jury') threw out, in the thirteenth century, a new branch which became still more famous as the Trial Jury, or Petty Jury (because limited in number to twelve, as compared with the much more numerous Grand Jury). Whether it was, as Professor Lowell suggests, that the presence of the trial jury made the use of torture impossible, because the jury would not listen to the confession of a tortured person, or whether it was simpler to leave the whole question of guilt or innocence to the jury, it is certain that the Courts which used a jury did not use torture, except, curiously enough, to compel an accused person to renounce his ancient right to the clearing oath and plead to a jury (*peine forte et dure*). That torture was not impossible in English legal proceedings, was proved by the history of the Star Chamber, which did not employ juries, but used inquisitorial procedure.

The broad result of the acceptance in England of the jury-system in the proof of facts, or, as it would now be called, in passing on the evidence, was very striking. At first the jury were supposed to find a verdict of their own knowledge; and,

down to the end of the seventeenth century, it was still the law in England that a jury might use its own personal knowledge of the facts to supplement the evidence given before it.¹¹ Yet, as population increased, and it became more and more impossible for juries to rely upon their own knowledge of the facts, the judges were gradually forced to accept the testimony of witnesses in the modern sense, and to place their evidence before the jury in such a way that they (the jury) could understand the bearing of it on the facts in issue. Thus the judges gradually built up a law of evidence on common-sense principles, namely, avoidance of prejudice, exclusion of irrelevant matter, and disregard of mere gossip or hearsay. Admittedly in some respects they were too strict—for example in the refusal to admit the testimony of interested parties; and thus they left work for law reformers like Bentham, whose proposals were carried into effect by statutes of the nineteenth century.¹² But the system which they built up was in striking contrast with the more ambitious but far less satisfactory system of the Romano-Canon Law which prevailed in Continental procedure; where there was no jury, and where highly technical rules as to the number of witnesses required to prove a fact, 'full' and 'half-full' proof, and 'common opinion', led to questions of great complexity and subtlety. Moreover, it should not be forgotten, that the regular practice of English law which requires a judge to present the facts of the case to a jury in orderly form, has a most powerful disciplinary effect upon the judge's own mind, and renders him increasingly efficient in coming to a

correct conclusion on the evidence in the growing number of cases in which he sits without a jury. For this reason, as well as for other reasons, the rule which is said to prevail in several of the States of the American Union, forbidding the judge to 'sum up' the evidence to the jury, is to be deprecated.

Having considered at some length the interpretation of the various forms of law in an earlier chapter,* we may conclude our sketch of the judicial machinery of the law by referring briefly to two other elements of a judicial trial which are of the first importance. One of these is the recognition that the parties to a trial have a right to be represented by advocates and other skilled advisers, not merely to conduct the Court proceedings, but to do the work of preparation of pleadings and other preliminary stages of a lawsuit. For historical reasons, this practice was somewhat long in arriving ; for a modern trial is really a substitute for the old self-help, in which the interference of third parties was looked upon with suspicion. Counsel were not allowed to appear for the accused in serious criminal cases in England (except in charges of High Treason) until 1836,¹³ unless a point of law, as distinct from fact, arose ; and the exclusion of advocates from French trials was quite common, both in criminal and civil proceedings, until the Revolution. But the striking modern movement for providing poor persons with free legal assistance in lawsuits appears to show, that the conviction of the injustice of depriving the litigant of professional assistance is fully

Professional
help

* Chapter V.

recognized. A person may have the best case in the world, and yet be quite incapable of stating it effectively.

The other safeguard of judicial trials is publicity. Here England has an honourable record, which she probably owes to much the same cause as her common-sense law of evidence, viz. the adoption of the jury-system. The jury was, in effect, in early days, the representative of the district (*pais*) ; and trials before it have always been held in public. But from the very beginnings of State justice in England, the reports show that trials were so heard, even where there was no jury. On the other hand, the rule on the Continent, especially in the matter of the examination of witnesses, was for long the other way ; and it needed the efforts of a Mirabeau and a Mittermaier, aided by the French Revolution, to open there the doors of the Courts of Law.¹⁴ With the development of the popular Press, this essential characteristic of sound judicial procedure has, of course, been made enormously more effective ; and abuses have, naturally, arisen, especially where the publicity extends, as usually in England, to the preliminary examination of persons accused of indictable offences. Curiously enough, there is no statute requiring such examinations to be held in open court. But the intense reaction against the secret trials in the Star Chamber established the practice in the late seventeenth century ; and it is now almost universal. As a result, juries often take up their duties in the subsequent trial with a strong prejudice for or against the accused.

We must now deal briefly with the second section

of the State's machinery for the enforcement of law, viz. the executive or police side.

Police

This section is no less essential for the civil than for the criminal side of the law ; but, from the nature of things, it is much more important in the latter. Generally speaking, in civil procedure, the conduct of the case is in the hands of the parties or their advisers. Consequently, though there are Court officials to assist them in making effective the various stages of a lawsuit—the officials of the Registries to issue writs, complaints, summonses, and, according to the Continental practice, *greffiers*, *sergents*, *huissiers*, *Gerichtschreiber*, etc., even to 'serve' these documents on the opposite party, as well as sheriffs and bailiffs to carry the judgment into execution, yet, as a rule, these various officials only act on the request of the party seeking to take advantage of the proceeding in question. In criminal proceedings, the police have a double rôle to play. Not only have they to act as the executive hand of the prosecutor and the Court throughout the proceedings, and to carry into effect the judgment of the Court ; but the initiation of the proceedings is, perhaps in a majority of cases, entirely in their hands. The first step taken by the citizen who has suffered from, or even merely witnessed, the commission of a crime is, to 'call in the police', i.e. to give information which will lead to the arrest, or, at least the summoning, of the suspected criminal. But, of course, it is not in the least necessary for a constable to wait for information before taking action. Moreover, though, at any rate in England, a private citizen can insist, if he chooses to run the

risks involved by such a step, on his charge being proceeded with, yet, in fact, even in England, the police authorities exercise very considerable discretion as to whether or not a prosecution shall be commenced. On the Continent of Europe, in spite of the more 'inquisitorial' character of the procedure, the police, though they are, unlike the ordinary English police, under the direct control of the central government, have, apparently, very much less discretion in the commencement of proceedings; this being largely in the hands of the *juge d'instruction*, who is at least a quasi-judicial person, acting, in most cases, in conjunction with the *procureur* of the State, an official of considerable standing.¹⁵ Further, the preparation of evidence for the prosecution is, in England, largely in the hands of the police; and, in spite of severe rules laid down by the judges with regard to the examination by the police of suspected persons, there are, obviously, considerable opportunities in this connection for infringement of one of the fundamental principles of English Criminal Law, that no person may be compelled, or even induced, to criminate himself. Finally, by a very undesirable practice, prosecutions are, in the lower courts, quite often actually conducted by police officers in uniform, who act as advocates as well as supplying witnesses. The dangers of a too intimate connection between the magisterial bench and its officials with the police, have been previously alluded to.

On the other hand, the practice which prevails somewhat widely on the Continent, of allowing police officers to inflict small fines for petty offences, without recourse to a judge or magistrate, is un-

known in England, where the line between judicial and police functions is strictly drawn. A proposal to allow a police official to give merely a formal warning, or caution, to an offender, to be recorded against him for use in the event of a repetition of the offence, aroused strong protest a few years ago. But, needless to say, a police constable has many powers of arrest, entry on private land and buildings, and the like, which do not belong to the private citizen; for, as a recent and interesting decision shows,¹⁶ though appointed, clothed, paid, and, to a large extent controlled, by a local authority, the English police constable is a servant, not of that authority, but of the Crown. One of the powers habitually exercised by the police, viz. that of searching the person and abode or office of a person duly arrested under a warrant of arrest only, is of very doubtful authority.¹⁷ And it seems to be quite clear, that a private citizen may, if he chooses, refuse with impunity to answer any question put to him by a police official with a view to getting evidence for a charge against another person; though he can, of course, be compelled to attend and give evidence, subject to the usual safeguards, if proceedings are actually commenced.

This chapter has not professed to do more than indicate the salient features of legal machinery. In almost every civilized country, that machinery is very carefully regulated, either by comprehensive Codes, such as the *Code d'instruction criminelle* in France, the German *Zivilprozessordnung* of 1877, and the Austrian *Civilprozessnovelle* of 1895, by ordinary legislative acts, such as the Supreme Court of Judicature Acts and the Indictable

Offences Acts in England, and, in great detail, by judicial rules issued under legislative sanction, such as the Rules of the Supreme Court and of the County Courts of England, and the picturesquely named Acts of Sederunt in Scotland. These enactments, carefully revised from time to time, and annotated with minute care, appear at frequent intervals in each country, and are regarded as the working handbooks of the practitioner. Reference has already been made to the works on Conveyancing and other form-books which deal with non-litigious business.

CHAPTER XI

CLASSIFICATIONS OF LAW

THE contents of a legal system may be classified on various principles. We have already seen, incidentally, how they may be classified according to (a) the different sources from which they are derived,* and (b) the different forms which they may assume.† These classifications are important, as we have seen, both from a scientific and from a practical or professional standpoint. But there is another principle of classification, of considerable interest from a scientific, and, even more, from a practical point of view, viz. that of the purposes or subject matter with which the contents of a legal system are concerned. To this we must now turn our attention.

It is generally agreed by all jurists, except those who follow the strict Austinian doctrine that the State, being the source of all law in the juristic sense, cannot be said either to exercise rights or to enforce duties, that, on this principle, the first division or classification of a legal system of the modern type is into Public Law and Private Law. The difficulties to which the subscribers to the Austinian doctrine are driven by an attempt to ignore this distinction, will be apparent to every one who examines their

**Public and
Private Law**

* Chapter IV.

† Chapter V.

efforts to carry their doctrine into effect. Austin, for example, who goes so far as to say that "*public law* and *private law* are names which should be banished the science"¹ (of Jurisprudence), is driven to class Constitutional Law under the head of Law of (Abnormal) Persons. This step disregards two important and obvious facts—(1) that what Austin calls the Law of Political Conditions is law which affects directly every member of the political community of which the State is the organ; and (2) that, whatever may be the case in primitive governments of the autocratic type, in all States which have advanced beyond this type (i.e. the great majority of civilized political communities of the modern world), the State does, in fact, exercise rights, and even, to a large extent, perform duties, of a strictly legal type. In other words, the modern State is a *Rechts-staat*, as the Germans call it, i.e. a State which, except in times of crisis, acts according to legal rules. It is, of course, quite true, that the manner in which the State exercises rights and performs duties is different from the manner in which rights and duties are exercised and performed by its subjects. That is, indeed, the basis of the classification into Public and Private Law. But it is not a satisfactory ground for denying that Public Law exists as a distinct branch of a legal system. In fact, it is just the very reason or basis of the classification.

We define Public Law, then, as that part of a legal system in which the rights and duties created by the law are exercised or enforced by and against the State. The State, being an abstract conception, cannot act as an

Public Law

individual can act ; it can only act through agents. Moreover, it being the sole depository of the exercise of physical force in the community, any attempt to exercise physical force against it is an act of revolution, and, therefore, outside the law. But if, as a matter of fact, it habitually exercises its powers, through its agents, in accordance with legal forms, if, further, it has devised or recognizes legal forms by which it can be constrained to perform its duties, then in fact it is subject to the law, though it can, admittedly, change the law by constitutional means. An exercise of its power in defiance of the law is generally described as a *coup d'état*, which is a revolution from above, as contrasted with a revolution from below. It is an act of war against the community.

The first, and, possibly, the most important sub-division of Public Law is that known as Constitutional Law. It has two main purposes ; first, to fix the distribution of political authority amongst the various institutions which together make up that complex organization known as The State—King, President, Parliament, Ministers, Law Courts, local governing bodies, and the like ; second, to define the rights and duties of each against or towards the citizen or the alien within the territory of its operations. In political communities having ‘ written ’ Constitutions, these rights and duties are, more or less minutely, fixed by statutory law ; in ‘ un-written ’ Constitutions, many of them depend on decisions of the Courts of Law, which are deemed to interpret authoritatively rules of law which are derived from custom or long-continued practice.

The proof of their existence is that they can be enforced, in a strictly legal way, by the Law Courts. In England and most other countries with a monarchical form of government, for historical as well as for severely practical reasons, no attempt can be made to enforce them directly against the Crown, the highest organ of the State ; but, in Republican States, the impeachment, even of the President, the highest officer of the State, is not unknown as a legal method of enforcing constitutional duties. And in England, as well as other members and dependencies of the British Commonwealth of Nations, an even more effective enforcement is afforded by allowing the injured party to prosecute criminally, or sue civilly, the State official who acts illegally, as though he were a private citizen ; the defence of ' act of State ', or ' superior orders ', being inadmissible in such cases. In France, an admirable system of administrative tribunals, headed by the *Conseil d'État* and the *Tribunal des Conflits*, enables the citizen injured by the unlawful, or even merely arbitrary, act of the State or its officials, to obtain redress, to an extent which would hardly be possible in England ; and, by these means, some of the imperfections which disfigure the working of the Rule of Law in the latter country are avoided, for example, the defect that no action alleging a delict can be brought against the State, save in the rare cases in which it is authorized by statute. The importance of the right to enforce redress of injuries by legal proceedings against the State is recognized also in the modern Constitutions of Germany, Austria, Greece, Poland, Czecho-slovakia, and other States. In the

face of these facts, it seems to be difficult to deny the existence of a branch of law in which the State plays the rôle of legal person, vested with rights and subject to duties.

Some difficulty has, however, been caused in this connection, by the existence of certain practices or traditions, which, though they cannot be enforced by legal sanctions, e.g. proceedings in the Courts of Law, yet do in many cases substantially, in some cases profoundly, modify the working of a Constitution ; so that to attempt a description of the Constitution without referring to them is, as has been well said, to present the frame without the picture. These 'conventions of the Constitution', as they are called by English writers, are, naturally, more conspicuous and powerful in 'unwritten' Constitutions, whose flexibility readily lends itself to their development, than in 'written' Constitutions. In England, for example, almost the whole working of that vital part of the Constitution known as the 'Cabinet system', depends upon conventions not recognized by any Court of Law as giving rise to legal sanctions. But similar conventions are by no means unknown in countries with 'written' and 'rigid' Constitutions, e.g. the rule that the members of the Presidential electoral college in the United States of America vote strictly according to mandate, though, by the letter of the law, and, probably, according to the intentions of the framers of the Constitution, they have free liberty to choose a President among legally qualified persons. Austin² is perfectly right in describing such conventions as 'positive morality' only ; but this

admission does not in the least forbid the existence of a great deal of true Constitutional Law in modern States. The most conspicuous exception is, of course, Soviet Russia, where, apparently, the executive authority can control or override at its will the action of the Courts of Law.

We may conveniently take next a sub-division of Public Law which is of such recent appearance, that some jurists are unwilling to recognize it all. This is what is called Administrative Law, the nature of which it is necessary to examine with some care.

The accepted and ancient division of State powers into legislative, executive, and judicial, has recently undergone much criticism; but, inasmuch as the criticism has been directed from different angles, the result has not been entirely satisfactory. Some critics have been intent mainly on distinguishing administrative from judicial powers; and there would appear to be considerable agreement on this point. We have already had occasion * to discuss the nature of the latter. Exercise of the judicial office, as has been said, implies the existence of a *lis inter partes*. A alleges that B has committed a breach of duty; B denies it. The function of the judge is twofold; first to ascertain the facts, second, to decide whether the ascertained facts amount to a breach of duty imposed by law on B towards A. The judge, acting simply as judge, has no discretion. In theory, he neither creates nor extinguishes rights or duties; if he does, he has failed in his office, which is, simply, to declare what the rights and duties of the parties

* Chapter X, pp. 220-3.

were when they approached the tribunal. It is true that, in a large number of cases, he has 'considerable discretion *after pronouncing his decision* ; the law may have given him the choice, within limits, between several sanctions. This is manifest in Criminal Law, where, as is usual in most legal systems, the judge fixes the penalty, within wide limits, in all but a few cases. It is also true of Civil Law, at least in the English system, where those sanctions called ' equitable ' are always in the discretion of the judge as an alternative to the remedies of the common law. But in exercising a discretion of this kind, the judge is exercising functions of a kind not strictly judiciary. This is true also of proceedings which, though conducted by judges, are significantly called ' administrative ', such as the carrying out of a trust, or the winding up of a deceased person's estate.

Again, we distinguish between administrative and executive functions. The executive officer, in principle, simply obeys orders. The constable who arrests an individual in pursuance of a magistrate's warrant, the bailiff who levies an execution in pursuance of the judgment of the Court, the gaoler who retains in prison an offender in pursuance of the sentence of the Court—these are typical executive acts. Even the constable who, without a specific order or warrant, arrests a suspected criminal, is really only carrying out a general order imposed by the law ; though admittedly, as has before been pointed out, he must, to a certain extent, exercise discretion.

Quite clearly, however, when we speak of an administrative official, we think of some one with

far greater liberty to exercise his discretion than either the judge or the executive officer. As his name implies, a Minister of State is an administrative official ; because he is concerned with questions of policy, which obviously imply a large exercise of discretion. This is an extreme case ; but equally it is now clear that a Bench of magistrates considering the grant of new liquor licences, or a borough council voting its Budget, is acting administratively. How are these persons to be distinguished from the class of officials whom we call judicial and those whom we call executive ?

Surely by the fact that the true administrative official has power to create rights and duties, not merely, as the judge does, to declare their existence, or, as the executive official does, to give effect to them. The Minister who approves a Town-planning scheme, or issues a ' stand still ' Order on an outbreak of foot-and-mouth disease, or approves a loan proposed to be raised by a borough council, is creating a vast number of new rights and duties. He is conferring on the town council or the sanitary inspector of the district affected, or the investors in the borough stock, the right to restrict the use of property, to seize and destroy cattle, or to sue the borough for money lent. On the other hand, in the same examples, he is imposing on landowners the duty of conforming to the scheme, upon the farmers of permitting their cattle to be destroyed, on the ratepayers of paying increased rates to meet the interest on the loan. The constable who exercises his discretion by arresting a suspected criminal without warrant, creates no new rights or duties.

He may, unless he can plead a special privilege, even be liable to an action for his conduct.

But, it may be said : " You are running the risk of proving too much. Creating rights and imposing duties is a function, not of administration, but of legislation." That is perfectly true ; and there is, admittedly, no hard-and-fast line between legislation and administration, except that, in States in which the Executive (or, as it should be called, the Administration) is subject to Parliament, administrative legislation is only made with the permission, and, usually, under the authority, of Parliament, the supreme legislative body. It comes under the category of subordinate legislation, whether it is a far-reaching Order in Council or decree, which affects whole classes of the community, or is merely a Ministerial order, *règlement sanitaire*, or by-law, applying only to a limited area, or, finally, a magisterial decision to grant a single liquor-licence.⁸ Of course, however, where independent powers of issuing decrees are conferred upon the Head of State by the Constitution, this test will not serve.

And, in any case, the tests which we have hitherto applied are rather those of form and authority than of purpose or object. If we seek the purpose of Administrative Law we find it in the desire to conserve and develop the resources of the community, economic, hygienic, and cultural. Typical instances of English Administrative Law are the statutes regulating the constitution and authority of the Port of London, the Electricity Board, and the Metropolitan Water Board, the Public Health Acts, the vast number of Private Acts of Parlia-

ment which create public utility bodies, the whole schemes of State Education and Local Government. M. Berthélemy, the eminent French jurist, whose classical work on the *Droit administratif* of France has already reached a twelfth edition, would include many other subjects, such as the police, national defence, and the liberty of the subject. But he, breaking somewhat sharply away from the older French doctrine of Montesquieu, regards the whole of the activities of the State as being divisible into two parts, the making of laws and putting them into execution; administration being that part of the executive authority which is not concerned with the rendering of justice.⁴ English tradition refuses to accept this classification, and, accordingly, places much of M. Berthélemy's Administrative Law under the head of Constitutional Law. But we may agree with him, that the development of the *État-gendarme* into the *État-providence*, which is so marked a feature of modern history, is constantly enlarging the sphere of Administrative Law.

It may be worth while to note, in passing, that while the distinction between the common or general law applicable throughout the territory of the State, and the local law, operating only within restricted areas of it, at one time so important in Western Europe, is now tending rapidly to disappear, yet in the sphere of Administrative Law it is still of practical importance. For, while the main outlines of that law, and its most important provisions, are applicable to the whole territory of the State, yet many of its provisions are applicable only to particular areas. And, while the adminis-

trator in each area must know the common or general law governing his functions, and, very specially, such parts of Administrative Law as affect his area in particular, he is not concerned to know the provisions of the Administrative Law as they affect exclusively other areas, which are, in many cases, enacted by authorities having a purely local jurisdiction. Finally, the fact that breaches of many, if not most, of the provisions of Administrative Law are punished by the criminal or 'correctional' tribunals of the State, and at the instigation of State officials, emphasizes the claim of Administrative Law to recognition as a branch of Public Law ; though, probably, English jurists, for historical reasons, will long continue to class the relations between executive officials and the private citizen as matters of Constitutional Law.

A claim has also been made for the recognition of Industrial Law as a separate branch of Public Law. For some time after the disappearance of serfdom had practically changed industry from a status to a contractual basis, the regulation of industry was left to the provisions of Private Law, substantially the Law of Property and the Law of Obligations. This was, in effect, the period of *laissez-faire*. If a mill-owner's operations fouled the stream in which his neighbours had rights, or if they emitted evil smells and raucous noises, his neighbours who suffered could bring actions of Nuisance against him. If a workman's wages were unpaid, he could sue his employer for breach of contract. If the operative suffered injury in the course of his employment, he could sue his employer for negligence or any other

recognized tort or delict ; subject in some cases, to the awkward doctrine of ' common employment ' .⁵

But, in the early years of the nineteenth century, it became increasingly evident, that the remedies of the common law were quite inadequate to protect either the employees in industry or the general public against wealthy factory-owners who, deliberately or negligently, caused suffering and loss to them, and, if the injured persons ventured to invoke the law, sheltered themselves behind every legal barrier that highly-paid ingenuity could devise. The change may or may not have been influenced by the repeal of the Combination Laws in England and the rapid growth of workmen's organizations which followed. At any rate, the appearance on the Statute Book of a long series of Factory and Workshop Acts dating from 1833, marked the development of a new type of law, directly enforced by the State, for the purpose of preventing, rather than compensating for, injuries inflicted by the working of industrial processes. Another great step was taken by the passing, in the year 1897, of the first English Workmen's Compensation Act, which relieved the injured workman from the often impossible task of proving personal negligence on the part of his employer. It is true that, in proceedings under the Act and its amendments, the initiative is not taken by the State, but by the injured party ; but the State acts as arbitrator, not as judge. A long series of statutes affording special protection to persons engaged in dangerous industries, such as mining, are strictly public in character ; for proceedings under them are initiated by the State. The same is the case

with the Trade Boards Acts, which date, in England, from 1909, and have as their object the enforcement of a minimum rate of wages in 'sweated' industries. Finally, the direct intervention of the State in industrial disputes, after having been long familiar in the overseas Dominions of the British Empire, was definitely adopted in England by the Industrial Courts Act of 1919. There has been a similar movement in other countries of Western Europe. Even in France, where the principles of the Revolution were long supposed to be inimical to the recognition of any organization coming between the State and the individual, the Waldeck Rousseau Law of 1884 at last recognized the legality of *syndicats ouvriers*; and the impulse given by this recognition has rapidly produced a French *Code du travail*, with the familiar objects of regulating hours of work and conditions generally in dangerous or unhealthy occupations.⁶

Thus it seems clear, that the claim of Industrial Law to rank as a distinct branch of Public Law has been made good; even if there are some subjects, e.g. National Health Insurance and Old Age Pensions, which appear to be on the border line between Administrative and Industrial Law. In England, National Health Insurance is, in fact, based on the contract of employment, and so there falls under Industrial Law; but there is no particular reason why it should be. On the other hand, Unemployment Insurance naturally falls under Industrial Law.

It will, it is hoped, be clear from what has just been said, that the author is in agreement with Sir Henry Slessor, who was one of the first, if not

quite the first, to put forward, in the year 1925, a reasoned claim for the recognition of Industrial Law as a separate branch of a modern legal system.' Where he would venture to differ respectfully from so high an authority, is in the suggestion that Industrial Law should rank, in the general scheme of such a system, alongside of Commercial Law, as a subdivision of Private Law. It is, of course, true, that Industrial Law presupposes, as its basis, the existence of the contract of employment, and that the Law of Contract is, unquestionably, a part of Private Law. But, as Sir Henry Slessor's manifesto to itself so clearly shows, the most prominent feature of Industrial Law is that it removes the question with which it deals from the operation of the Law of Contract. It is, for example, useless for an employer, threatened with prosecution for a breach of the Factory Acts or the Trade Boards Acts, to plead that his employees agreed to overlook his conduct in those matters. The whole point of the emerging system is, that the State takes an active part in the enforcement of it, and does not leave enforcement to the initiative of the party injured by a breach of it. Doubtless, the employee can still rely upon his private common law rights to protect him, if he chooses; but the more he relies upon the new legislation, the more he is dependent on the action of the State.

In spite of Austin's curious prejudice, there can be little doubt that Criminal Law is also an important branch of Public Law. As we have seen before,* its most striking characteristics are (1) that it inflicts punishments,

* Chapter VI, pp. 122-8.

which, whatever their ultimate purpose, act as penalties, not as mere compensations to injured parties, (2) that not merely the infliction of these penalties, but the conduct of proceedings to ensure their infliction, is in the hands of the State. There are, in practice, in most modern systems of law, sub-divisions of penal offences according to their presumed gravity; in England between indictable offences and offences summarily punishable (which, of course, does not mean punishable without trial), in France between *crimes*, *délits*, and *contraventions*. These are matters which each system regulates in its own way. More important is it to note that, by the very nature of the case, substantive Criminal Law invariably has, in modern systems, a special procedure of its own, which, despite the fact that it is sometimes employed, as in England, for infractions of Administrative and Industrial Law, is not really suitable for that purpose. So that, under the head of Criminal Law, as well as under those of Administrative and Industrial Law, we must make a sub-division into (a) substantive, and (b) procedural law.

The last branch of Public Law is the law affecting the armed forces of the State. The conditions of military service are so special, so
Military Law unlike those of civilian life, that the soldier, sailor, or airman who undertakes them has to submit to a type of discipline which imposes upon him duties unknown to the civilian code, possibly also confers on him rights which the civilian does not enjoy. It is a firm principle of English law, that the person subject to military law does not thereby escape liability for offences

committed by him against civilian law, or lose his rights, beyond a certain limit, under the latter law. Moreover, where there is a conflict of jurisdictions, the civilian jurisdiction prevails. But these principles are by no means always adopted in other systems ; and, even in English Law, the differences between military and civilian law, both in substance and procedure, are so great as to mark off the former as a distinct branch of the law. Obviously, it is a branch of Public Law ; for breaches of military duty are breaches of duty towards the State, and are vindicated by the State ; while rights created by the military code, if any, are enforceable against the State. In military law also, therefore, we require a sub-division into substantive and procedural law.

Before leaving our account of the great division of Public Law, we may observe that there is room in it for a subdivision of the Law of Abnormal Persons. Whether, in the arrangement of an ideal Code of Public Law this should be reserved to the end and treated as a single chapter, or whether it should be interspersed among the chapters of the normal Public Law, is a question largely dependent upon the extent of the disabilities and privileges affecting such persons. In a modern and liberal system of law, they are probably few, and can best be treated under the various rights and duties described in the different chapters of the normal Code. Thus, for example, infants, aliens, convicts, bankrupts, collective persons, and lunatics are usually disqualified from exercising Parliamentary and municipal franchises, and becoming or remaining members of Parliament and local government

bodies; while judges, members of legislative bodies, and certain minor executive officials are exempt from liability for *bonâ fide* errors committed by them when acting within the spheres of their respective offices. These exceptions from the ordinary rules of Public Law can easily be described under the statements of the rules themselves. On the other hand, if the abnormal classes of persons in a legal system are many, and their privileges or disabilities numerous, it would probably be more convenient to append to the Code of Public Law a chapter specifying in detail the nature of the various classes, and the special disabilities or privileges of each.

We come now to the other great branch of a legal system, Private, or as it is sometimes called, Civil Law. The common mark of all the subdivisions of this branch of the law is, that the rights and duties created by them are exercised and enforced by and against private citizens, as distinct from the State and its officials, and that the commencement and abandonment of the procedural rights and liabilities offered by it are in the hands of the parties themselves. Another common, though not necessary, characteristic of this branch of the law is, that it has a more or less uniform system of procedure, varying only to a slight extent in accordance with the rules of the tribunal in which the proceedings are taken. As a consequence, it is usually more convenient to make the first sub-division of Private Law into (a) substantive and (b) procedural law, instead of, as in the case of Public Law, where the procedure for enforcing the different sub-divisions varies greatly,

as a second sub-division of each of these subdivisions.

In the next place, we shall require, both in the substantive and the procedural sections of Private Law, to draw an early distinction between the law affecting normal and that affecting abnormal persons. The differences which are caused by the legal disabilities of such abnormal persons as infants, bankrupts, persons of unsound mind, and collective persons are very considerable in, and run throughout the whole of, substantive Private Law. On the other hand, the differences in procedure are small, and can easily be dealt with as a supplement to the general code of procedure in Private Law.

We come then to the further sub-division of substantive Private Law, as it affects normal persons, into the various topics with which it deals. There will be found to be, in modern legal systems, a somewhat remarkable uniformity on this point—another proof, if any be required, that Jurisprudence has a justifiable claim to rank as a science.

Most of the actual Codes of Private or Civil Law now in force commence with a statement of 'general rules' which is intended to avoid repetition by defining expressions such as 'persons', 'things', 'rights', 'duties', 'acts', 'forbearances', and the like, which occur frequently in the later chapters of the Code. But, as we have already had occasion to deal with these in some detail, we may pass at once to the main sub-divisions which are included in the scope of Private or Civil Law. The order in which these are taken is largely arbitrary. The French *Code civil*, for example, deals first with Family Law (including

intestate succession), then with Property Law (including testamentary succession), finally with the Law of Obligations; the German *Bürgerliches-gesetzbuch* of 1900 deals first with the Law of Obligations, then with Property Law, then with Family Law, finally with the Law of Inheritance (testamentary and intestate). There appears to be little to choose between the two from the point of view of convenience. We may adopt the order of the French *Code civil*.

The family is a pre-political unit of society which has survived into the political stage. Consequently, the State has always had to recognize it as an established institution, and, at any rate for a long time, to share the control over it with other authorities, especially the Church. Not only the Christian Church, but earlier religions, such as the Roman and the Jewish, claimed to regulate both the form and the effects of marriage, which is the basis of the family. The Roman 'confarreate' marriage, for example, which invested the husband with the *manus* or complete control over his wife and children, was a definitely religious ceremony. All through the Middle Ages in Western Europe, the celebration and the relaxation of the marriage tie (if permitted at all) were matters purely for the ecclesiastical Courts, whose certificates the State's Courts had to accept, save where, as, for example, in the case where legitimation of children born before the marriage of their parents was in question, the State, by a resolute effort, took the decision into its own hands.⁸ Towards the end of the eighteenth century, however, the State began to encroach substantially

upon the domain of the ecclesiastical power, first by recognizing, and, ultimately, in many cases insisting upon, 'civil marriages', and, later, by establishing divorce jurisdictions. Thus Family Law became definitely established as part of the Civil Law.

There can be little doubt as to the motive which led the State to interfere in matrimonial questions. The growth, under the fostering care of the State, of the great institution of Property, raised awkward questions as to the effect of marriage. Probably the famous '*Nolumus leges Angliæ mutari*' of the English barons in 1236 was prompted by a desire to settle definitely the law of inheritance of feudal estates; in the question of succession to land, the State insisted on overruling the doctrine of the Church, by establishing the rule of primogeniture.

Still more decisive was the intervention of the State in regulating the proprietary relations of the parties to a marriage. In England, until the middle of the nineteenth century, what is generally known as the *régime dotal* prevailed. Under this the wife, though retaining the proprietorship of her land, an essential feudal principle, was deprived of the management of it during the marriage, and her movables passed to her husband on marriage, in return for an inalienable right to a proportion of the income of his land after his death during the remainder of her life. On the Continent, the system of *communauté des biens*,⁹ *eheliches Güterrecht*,¹⁰ was usually the presumption, though it might be altered by prenuptial contract. In either case, disputes as to the rights of the spouses to alienate property, and, in particular, the capacity

of the wife to enter into contracts, led to constant interference by the State ; while the modern movement in favour of the legal equality of the sexes has produced widespread State legislation. Finally, the same interest in proprietary questions, supplemented later by humanitarian views as to the care of children, has led the State to regulate the subject of Guardianship ; though, in England, the famous and peculiar institution of the Trust has deprived the subject of Guardianship of much of the importance which it has in Continental systems. Still, there is enough left, even in English law, to make Family Law an important sub-division of Private Law. It deals with capacity to contract marriage, forms of marriage, rights and duties of the spouses as between one another and as regards other persons, the termination or relaxation of the marriage tie, the rights and duties of parents and children, and, in some instances, the right of intestate succession between members of the family. One tenacious rule of the pre-political family has survived in almost every modern State except in England and communities which have adopted her law, viz. the so-called *legitim* (*réserve*, *Pflichtteil*), which restricts the right of a father to will away on his death from his widow and children more than a limited part of his property.

The second great sub-division of Private Law is the Law of Property. This is, almost entirely, a creation of the State. While, unquestionably, pre-political society recognized rights which afterwards, with the establishment of the State, became proprietary,

Law of
Property

the more the working of pre-political society is revealed to us by the labours of historians and anthropologists, the more probable does it appear that property, as we now understand it, was regarded in that society rather as an extension of the *mana* or personality, of the proprietor, than as an independent institution. What we should now call trespass and theft were treated, in patriarchal society, more as insults than as economic injuries. There was between the individual or group and the 'thing' a relationship which, doubtless, is the germ from which the modern concept of Property has developed ; but it was a far less clearly defined and understood concept of Property. The suggestion that Property is simply occupation ripened by lapse of time is an unfortunate excursion of the analytical jurist into the realm of history. There are many elements in the modern concept of Property other than the simple fact of physical control long continued ; for examples, fiscal policy, jurisdiction, protection of bodily security, the desire to dissolve social groups. Most of these elements have been contributed by the State.

To take the modern institution of Property as we see it in force, we find it to consist of two principal elements (a) a body of rights, with their corresponding duties, which duties are imposed on members of the political community generally, or with special exceptions only (*jura in rem*), (b) exercisable over, or in respect of, a subject-matter which is either a 'thing', as previously explained,* or at least an entity conceived as 'thing-like'. This body of rights varies from the wide concept of

* Chapter VIII, pp. 180-6.

'ownership', which, in theory, includes all kinds of proprietary rights, and tapers off, through tenancies of land, hiring of chattels, rights to receive dividends on shares, down to such very limited rights as that of a mere right of passage over land, or right of way. The subject-matter of such rights, again, may vary from land or immovables, through chattels (movables), to incorporeal entities such as monopolies, rights to receive annuities, debts, and the like. Obviously, these different categories of proprietary rights require different treatments by the law. The two first ('corporeal property') can be guarded by physical control or possession, and can thus be safeguarded by remedies known as 'possessory'. But the difference between land, which is fixed in position and permanent, and virtually indestructible, obviously permits of more elaborate variations of proprietary rights than those applicable to chattels or movables, which can be destroyed or disappear, and, in many cases, have only short lives. Again, special remedies must be devised to protect 'incorporeal' property, i.e. property which has no tangible subject-matter, such as monopolies and debts. The question of alienation or transfer of such rights is also important. A method of transfer well-suited to property in land may be wholly unsuited to property in chattels or 'things-in-action'. The State has, from early times, favoured the free alienation of property, though with exceptions in some cases. Pre-political society was, on the whole, against liberty of alienation, which it regarded with suspicion.

Thus we get the familiar sub-divisions of Pro-

erty Law—Law of Immovables, Law of Movables, Law of Incorporeal Things—i.e. an enumeration of the rights comprised in each, and their corresponding duties, and the modes or titles by which each is acquired or lost, or methods of alienation. All modern systems draw a great distinction between alienations *inter vivos*, i.e. intended to take effect at once between alienor and alienee, and alienations *post mortem*, i.e. taking effect only on the death of the alienor. As we have seen,* the French *Code civil* allots the latter group partly to Property Law (testamentary succession) and partly to Family Law (intestate succession); the German *Bürgerliches-gesetzbuch* makes a separate section of it. Modern English Law, though uncoded, is, on the whole, inclined to adopt in this matter the German method. The Wills Act of 1837 and the Administration of Estates Act of 1925, and their amendments, together form what may fairly be called a Law of Succession.

We come last to the sub-division of Private Law known as the Law of Obligations.

Law of Obligations

The word 'obligation' has been used at different times and places in legal systems with very varying meanings. Sometimes it stands for what we should call simply 'legal liabilities' of any kind; it is not unusual to hear it said that "every duty creates an obligation". Obviously the word cannot be used in this sense to signify a sub-division of a division of a legal system. Then the word is, in French law and formerly in English law, used to signify a particular kind of contract (bond, negotiable instrument,

* pp. 258-9.

valeur, lettre de change, Inhaber-papier). This use is as much too narrow as the former is too wide to serve our present purpose. Other attempted definitions describe obligations as 'arising out of contract or out of delict'. This may be a description; but it is not a definition. An obligation may be defined for our purposes as a right, with its corresponding duty, to the performance of an act or forbearance, a violation of which right gives rise to an action for compensatory damages by the person in whom the right is vested, against the violator. This definition seems to fit the arrangements of English law as well as those of other systems; for rights and duties arising out of Family Law do not, as a rule, give rise to actions for damages, nor do actions arising out of that peculiarly English institution, the Trust. On the other hand, acts or forbearances arising out of Property Law do give rise to such actions; and, in English law, these are classed as obligations, though they are enforceable against members of the community generally, as are also so-called 'personal' or 'absolute' rights, such as to the liberty and security of one's body, reputation, business relationships, and other rights having no tangible or 'thing-like' subject-matter.

But, in one very important respect, the English Law of Obligations differs from that of most other systems. The latter divide obligations into civil and commercial, i.e. those applicable to citizens generally, and those affecting only the class of merchants, or, in some cases, mercantile transactions.¹¹ This was at one time an almost universal feature of legal

**Commercial
Law**

systems ; the Law Merchant being a kind of international code applicable to mercantile transactions, at least when these were effected by merchants, and enforced in special Courts Merchant. In England, owing to the remarkable influence of the great judges of the eighteenth century, especially Lord Mansfield, the distinction disappeared ; the rules of the two bodies of law, the Common Law and the Law Merchant, being harmonized. It is true that there is to-day in England a so-called Commercial Court ; but the law (as distinct from the procedure) administered in it is the same as that administered in the other Courts of the State. In fact, there are in England only the rarest differences between the legal position of traders and other citizens ; mainly in bankruptcy procedure. In other countries, this is by no means the case ; for there a sale of a chattel, for example, may be governed by quite different rules, according as to whether it is an isolated transaction between two acquaintances, or a business deal between manufacturer and retailer. Consequently, the practitioner in foreign law called upon to advise upon such a case must always be careful to see whether it falls under the *Code civil* or the *Code de commerce*, the *Bürgerliches-gesetzbuch* or the *Handels-gesetzbuch*. We must, therefore, in framing a general scheme of classification for modern legal systems, allow for a sub-division of the Law of Obligations into (a) those governed by the Civil Law only and (b) those governed by the Commercial Code, at least in the first instance.

In each of these sub-divisions, there will be a further sub-division into obligations arising from

contracts, from transactions which the law treats as contracts ('quasi-contracts'), and obligations arising from delicts or 'torts'. The German Civil Code (*Bürgerliches-gesetzbuch*) of 1900 makes an attempt to abolish these distinctions; but without much success. The difference between an obligation which is imposed only as the result of entering into a contract, and that which is imposed by law directly, is fundamental. In adjudicating upon the former, the judge is primarily concerned with the terms of the contract; for they alone define the obligations of the parties. Having discovered these, he must then discover whether they have been fulfilled or broken, and to what extent. Finally he applies the law to the case. If the case is one of delict or tort, the judge has merely to ascertain the conduct of the parties, and then apply the rule of law; the first part of his task in the contractual action is eliminated.

The sub-division of quasi-contract, though familiar to Roman Law, has only recently appeared in modern legal systems; and it is still far from being settled. The general view of quasi-contractual obligations is that, though not arising out of strictly contractual relations between the parties, they arise from relations so similar to those created by a contract that, *ex bono et æquo*, the parties ought to be treated as if they had. Thus, for example, if A, from a misunderstanding or mistake of fact, voluntarily pays to B a sum of money in discharge of a debt which he does not really owe to B, he may bring an action to recover it from B, who will be held liable 'as if'

(*quasi*) he had contracted to repay it. The alternative hypothesis would be that B, at any rate if he realized the mistake, was guilty of fraud. Similar cases are, where A has received money to be handed to B, here, though A has never contracted with B to hand over the money, he is to be treated as if he had ; where persons have jointly and severally guaranteed a debt due from A to B, and B has sued one of them for the whole debt, the latter is entitled to contribution from his co-guarantors. Other cases are by no means so clear ; as when a person is sued in quasi-contract on a foreign judgment or for official fees. The principle, as distinct from the form, of liability on quasi-contract is said to be 'undue enrichment' ; but this is a rather vague ground for legal liability, while the implication of a contract in some cases is a violent fiction.

Obligations arising from delict or tort are distinguished from those arising from contract or quasi-contract by the fact that they
Law of Torts do not arise out of any special relationship between the parties, but as the direct result of a breach of the law by one of them from which the other has suffered loss, actual or technical. There is a striking difference, as has before been pointed out,* between the rules of English law on this subject and those of Continental systems. The latter, in their Codes, usually lay down certain broad principles which are assumed to cover all delictual breaches of the law, and give a cause of action to any one injured by them. They amount to saying, in effect, that if any person, intentionally

* Chapter IX, pp. 210-211.

or negligently (*faute*), causes harm to another, he will, apart from any criminal liability which he may incur, be liable to compensate that other from the harm done. The English plan is different, mainly owing to historical reasons. It proceeds to enumerate a certain number of torts or delicts, to define them carefully, and then to lay it down that an action for damages will lie where they have been committed. The merit of the English system is that it avoids elaborate discussions as to whether, in a given case, the conduct of the defendant has been really delictual, or whether, without *faute*, it has caused loss to the plaintiff (*damnum absque injuria*). Its defect is, that it omits to provide for cases in which there is obvious *faute*, but, for technical reasons, no remedy. Thus, for example, though forgery and perjury are crimes by English law, the party whose name has been forged, or who has been injured by false testimony, has, apparently, by English law, no remedy in tort against the forger or perjurer, while in France and Germany he probably would have.¹²

In conclusion, reference must be made to a branch of modern legal systems, of great and growing importance, which, in spite of the extent to which it has developed in recent years, it is still difficult to fit into any accepted scheme of classification of law according to its subject-matter. This is the branch known as The 'Conflict of Laws', or 'Private International Law'. It is called into action when a doubt arises whether a case ought to be decided by the law of the country in which it is tried, or

'Conflict of
Laws'

by the law of some other country. Examples will make the situation clear. A, a Genoese merchant, charters a British ship to carry cargo to France. A dispute arises between A and the shipowners over an accident which has arisen in the discharging of the cargo. What law ought to govern the dispute—the law of Italy, where the contract was made, that of England, where the ship is registered, or that of France, where the accident occurred? Or again, A, a British subject, domiciled in France, dies on a visit to Switzerland. By what law, that of his nationality, his domicil, or the place of his death, are his will to be interpreted and the devolution of his property to be governed? Similar questions, of great importance, arise out of mixed marriages, i.e. marriages between persons of different nationalities.

At present, at any rate, the rules which govern these difficult questions are decided by each State for itself; though there is a hopeful tendency towards assimilation which may, ultimately, result in an international agreement on a uniform Code. Meanwhile, a place has to be found for the Conflict of Laws within the scheme of a national system. Where?

Different countries have answered this question in different ways. In the French *Code civil* there are provisions regarding it to be found scattered among the chapters dealing with other branches of the law—capacity of persons, forms of marriage, rules of inheritance, and the like. Gaps are filled by the *jurisprudence* of the Courts, and the *doctrine* of the textbook writers. In Germany it is dealt with, more or less compendiously, in the Imperial

Einführungsgesetz of 1896, which brought the German Civil Code into action, and the corresponding statutes of the different States. In England, the law on the subject is mainly judiciary ; but there are textbooks which are received with great respect by the tribunals, and which do much to summarize the law and make it a separate branch of the legal system.

The subject is of extreme difficulty. Not only does it involve the examination of the laws of foreign systems by alien tribunals, a process always attended with danger ; but the results of such investigations sometimes lead to a deadlock. For instance, the law of country A (let us assume) provides that succession to the movable property of a person who dies, but is not domiciled, there, is governed by the law of the country of his domicil, B. On reference to this law, it is found that it provides that succession to the movables of a person who dies in another country, though he was domiciled in B, is governed by the law of the country in which his death took place. This is the famous doctrine of the *renvoi*. Apparently there is a vicious circle. Still worse, the rule may not be the same in the same system for different topics—marriage, succession, forms of wills and conveyances. On the whole, pending an international agreement, it would appear to be wiser, in view of the many branches of a legal system affected by the rules of *Conflict*, to distribute these rules among those various branches, instead of treating them as a distinct chapter or Code. A similar reason militates against the proposal to change the hitherto accepted name Private Inter-

national Law, however imperfect, to International Private Law ; for questions of the Conflict of Laws arise in matters of Public as well as Private Law. Still, in theory if not in practice, the Conflict of Laws is a distinct and separate branch of a national system of law ; and, as such, it is placed in the Table appended to this chapter.

APPENDIX

REFERENCES TO TEXT

CHAPTER I. THE SPHERE OF JURISPRUDENCE

No.

1. For examples, especially in post-war Constitutions, see *Les Constitutions de l'Europe nouvelle*, by B. Merkiné-Guezévitch, Paris, 1928, with summary at pp. 33-5.
2. In some countries provision is expressly made by the Constitution itself for (a) controlling or (b) enlarging the powers of the ordinary legislature. In others, e.g. France, it is the accepted doctrine, that any law of such legislature which conflicts with the provisions of the Constitution is unenforceable in the Courts; while any national desire to enlarge the powers of existing, or to create new, political institutions would be expressed by a spontaneously summoned constituent assembly.
3. As, for example, in the decisions which have, in effect, prohibited a Trade Union from wrongfully expelling one of its members (*Osborne v. Amalgamated Society of Engineers* [1911] 1 Ch. 540).
4. *Kemble v. Farren* (1829) 6 Bing. 141. See the distinction between penal and compensatory damages elaborately discussed in *Dunlop Pneumatic Tyre Co. v. New Garage Co.* [1915] A.C., at pp. 86-8.
5. For a more detailed explanation of the author's view of the evolution of the modern State, see his *Law and Politics in the Middle Ages*, London, 1913, especially chaps. III and V. The vagueness of the State's orbit seems to be happily suggested by the Spanish (Catalan) name for the State, viz. *Generalidad*.

CHAPTER II. METHODS OF JURISPRUDENCE

1. Holmes, O. W., *The Common Law*, London, 1882, p. 1.
2. The allusion is to the powers of the Court to give relief against forfeiture for breaches of conditions in leases of

No.

land (Law of Property Act, 1925, s. 146). But the general rule of English Law is, that a person who, of his own free will, enters into an engagement involving conditions, is strictly bound by them, even for mere thoughtless omissions.

3. Austin, *Jurisprudence*, Vol. I, pp. 94-7.
4. *Ib.*, p. 3.
5. e.g. Markby, *Elements of Jurisprudence*, p. 2; Hearn, *Legal Duties and Rights*, p. 5; and, with reservations, Holland, *Jurisprudence*, p. 88.
6. *Jurisprudence*, pp. 95-8. Austin does not specify the passage in Blackstone's *Commentaries* to which he refers. But, if he alluded to the well-known passage in § 2 of the Introduction to the *Commentaries*, his criticism appears to be hardly justifiable.
7. *Elements of Jurisprudence*, p. 2.
8. *Jurisprudence*, pp. 22-3.
9. Pollock, *First Book of Jurisprudence*, pp. 35-6; Salmond, *Jurisprudence*, pp. 20-1. But Sir John Salmond points out (pp. 23-4) the disadvantage of this alleged characteristic of the jurist's law; though without considering whether it is really essential.
10. *La définition du droit*, Paris, 1917, p. 165.
11. *Der Zweck im Recht*, chap. VIII, K. M. Lévy-Ullmann (*op. cit.*, pp. 102-6) has some acute observations on the changing character of Ihering's definitions. For another German definition, see Josef Kohler, *Einführung in die Rechtswissenschaft* (6th edn.) p. 1. In consideration of the circumstances, the author may be forgiven for the concluding paragraph of his preface to the 5th edition.
12. *Jurisprudence*, Vol. I, pp. 175-7. It is fair to remember, that Austin's work, which originally took the form of lectures, is known to us only in a posthumous publication, and may have suffered at the hands of its editors.
13. e.g. Holland, *Jurisprudence*, pp. 9, 43-8; Salmond, *Jurisprudence*, p. 3 n. The alternative term 'Civil Law', suggested by Sir John Salmond, is open to the very serious objection that it has, for jurists, at least two other and inconsistent meanings, viz. 'Private' (as opposed to 'Public') Law, and Roman Law.

CHAPTER III. METHODS OF JURISPRUDENCE

(continued)

No.

1. *The Common Law*, p. 112.
2. Ames, *The History of Assumpsit*, 2 Harvard Law Review, 1, 53 (reprinted in *Select Essays in Anglo-American Legal History*, Vol. III, pp. 259-304).
3. *A Mounty's Wife*, London (Sheldon Press), 1930, chap. XIV.
4. Oxford, 1927.
5. e.g. Henry II's Militia Ordinance of 1181 (Stubbs, *Select Charters*, pp. 153-6).
6. *Theory of Legislation* (ed. Hildreth), chap. III, s. 1.
7. Published in the Journal of the Society for the year 1931, under the title of *The Value of Comparative Law*, at p. 26.
8. *Jurisprudence*, Vol. I, p. 177.
9. *Courts and Judges in France, Germany and England*. Oxford, 1933.
10. Pound, *Outline of Lectures on Jurisprudence*, p. 1. Dean Pound deprecates the recognition of a separate comparative method, and suggests that the analytical and historical methods must be also comparative.
11. e.g. by the eminent French thinker, M. Léon Duguit, in his well-known essays published under the title of *Le droit social, le droit individuel, et la transformation de l'État*, Paris, 1908. This work will be discussed more fully in a later chapter (VIII, pp. 174-6). A further exposition of M. Duguit's philosophy may be seen in Vol. XI of the Continental Legal History Series (*The Progress of Law in the Nineteenth Century*) at pp. 65-146.

CHAPTER IV. SOURCES OF LAW

1. Institutes (ed. Gneist), I, II, §§ 3-9.
2. Blackstone, *Commentaries*, Introd. § 3.
3. *Jurisprudence*, Vol. I, pp. 98 and 225.
4. *Leviathan*, Part II, chap. 26.
5. *Commentaries*, Introduction, § 2.
6. *Pannomial Fragments*, chap. II (ed. Bowring, Vol. III, p. 215).
7. *Jurisprudence*, Vol. I, p. 226.

No.

8. *Jurisprudence*, Vol. I, p. 243. But this view is, as Austin himself admits, subject to the logical, though improbable, exception of a society 'governed by a sovereign body consisting of the whole community'—a *reductio ad absurdum* which appears to render his thesis untenable.
9. Appendix II, pp. 474–81.
10. *First Book of Jurisprudence*, pp. 247–8.
11. *Jurisprudence*, Vol. I, pp. 241–2.
12. *Op. cit.*, p. 261.

CHAPTER V. FORMS OF LAW

1. A good example is to be found in the English Petition of Right of 1628. The framers of that statute would not admit that they were changing the law. They even insisted that the royal assent should be expressed in an unusual form which recognized that view. Yet few persons can doubt that the statute left the law in a very different state from that in which it found it.
2. 32 Hen. VIII, c. 9, s. 2.
3. 60 & 61 Vict., c. 65, s. 11.
4. 18 Edw. I, c. 1.
5. 25 Edw. III, st. III, c. 2.
6. *Essays in Jurisprudence and the Common Law*, pp. 1–26.
7. 29 Car. II, c. 3.
8. *Petition for Justice*, ed. Bowring, Vol. VI, p. 500 ('spurious and fictitious'). Bentham was continually girding at 'judge-made law' (see Vol. III, pp. 280–3, 369 etc.).
9. For an example of the way in which concurrent streams of statutory and judiciary law may intermingle, with unfortunate results, see the author's article, *A Blind Spot in English Law*. (*Law Quarterly Review*, CXCIV, pp. 215–225.)
10. 56 & 57 Vict, c. 71 (passed in 1894 but dated as 1893).
11. 45 & 46 Vict., c. 61 (1882).
12. 53 & 54 Vict., c. 39 (1890).
13. *Poulton v. L. & S. W. Ry. Co.* (1867), L.R. 2, Q.B. 534.
14. *Percy v. Glasgow Corp'n.* [1922] 2 A.C. 299. For remarks on the difficulties caused by a strict adherence to the doctrine of judicial precedent, see the judgment of Scrutton, L.J., in *Hill v. Aldershot Corporation* [1933],

No.

K.B., at p. 263, and comments thereon in *Law Quarterly Review*, CXIV, pp. 155-6.

15. The Rule in *Shelley's Case* was a highly technical rule of construction, which prevented the creation of successive life interests in the same land intended to pass by succession in the line of descent which an interest in perpetuity ('fee') would have followed had it not been alienated. Those who desire to study its mysteries may be referred to any of the standard textbooks on Real Property Law. The one useful object which it served, viz. the prevention of the 'tying up' of land from alienation, is now achieved by the simpler and far more effective Rule against Perpetuities. The 'Shelley' Rule was finally abolished by s. 131 of the Law of Property Act, 1925. It is believed that this is the one example of a purely judiciary rule of law being mentioned by name in an Act of Parliament.

CHAPTER VI. THE LEGAL SANCTION

1. Ensor, *Courts and Judges in England, France, and Germany*, p. 90. (It seems odd that the expounders of Soviet Law should claim as a novelty the doctrine that the object of punishment should be the defence of society, not cruelty or revenge. It has been a common-place in civilized communities for upwards of a century.)
2. 4 Geo. I, c. 11.
3. 5 & 6 W. & M. (1694), c. 12.
4. e.g. 1 Edw. VI, c. 14 (Chantry Act).
5. [1919] A.C. 315.
6. By the Law of Property Amendment Act of 1924.

CHAPTER VII. THE LEGAL PERSON

1. This is, of course, the 'employee' class, which, by reason of much recent legislation in the countries of Western Europe, has tended to become a body with abnormal features in the legal system. The fact that these features are privileges rather than disabilities does not affect the question.
2. [1901] A.C. 426.
3. *Le Droit Social*. See especially Lecture I (IV) and II (IV).
4. *Traité élémentaire de droit administratif*. See especially Book II, Section III, chap. V (*Le domaine privé*).

No.

5. By the English rule of 'mortmain', a collective person, with certain exceptions, cannot hold land without a licence from the Crown.
6. e.g. Building Societies Acts of 1874 and 1894 (some Building Societies are incorporated; others are not), Friendly Societies Acts, 1896 and 1903.
7. Trade Union Acts 1871 and 1876.
8. As to the meaning of *mens rea*, see Chap. IX, pp. 199-200.
9. *R. v. Ascanio Puck & Co.* (1912) 76 J.P. 487.
10. *Theory of Legislation*, chap. XIII.
11. *Ancient Law*, ed. 1930 (ed. Pollock), pp. 33-34.

CHAPTER VIII. LEGAL DUTIES AND RIGHTS

1. 'The immediate objects of Law are the creation and protection of legal rights.' *Jurisprudence*, p. 81. And the author's next eight chapters are concerned almost entirely with a description and classification of legal rights.
2. *Op. cit.*, p. 143. And see Dr. Hearn's scheme for a Code in the Appendix to his work.
3. *Jurisprudence*, p. 180. But Salmond bases the scheme of his work much more on rights than does Hearn.
4. *First Book of Jurisprudence*, chap. III.
5. *Legal Duties and Rights*, p. 57.
6. 8 Edw. VII, c. 66 (Public Meeting Act).
7. *Jurisprudence*, Lecture XLV.
8. *Legal Duties and Rights*, p. 53.
9. Paris, Felix Alcan.
10. *Ib.*, Lecture I, Parts II and III.
11. Austin, *op. cit.*, Lecture XVII. Austin appears to assume, that the person for whose benefit the duty is imposed must, of necessity, be the person entitled to enforce it. There would appear to be no such necessity.
12. *Principles of the Civil Code*, Part I, chap. I.
13. *Droit social*, Lecture III, *ad fin.* (from Comte).
14. This is, virtually, the definition of Austin (*Jurisprudence*, Lecture XIII). It does not profess to take account of metaphysical problems.
15. Tab. III, 1. (Gneist). *Æris confessi . . . XXX dies justi sunt*.
16. Liebermann, *Gesetze der Angelsachsen*, p. 3. 'God's cattle and the Church's, twelve-fold' (fine).

No.

17. 5 & 6 Edw. VI, c. 16.
18. The Act of 1623 (21 Jac. I, c. 3, s. 6) is still the basis of English Patent Law, though the duration of the monopoly was extended in 1919.

CHAPTER IX. OCCASIONS OF THE LAW

1. *Jurisprudence*, chap. X.
2. *Jurisprudence*, Lectur^e XVIII. Hobbes terms it simply 'will' or 'the last appetite in deliberating' (*Commonwealth*, Part I, chap. VI).
3. *Jurisprudence*, Lecture XXI.
4. [1921] 3 K. B. 560
5. *Hadley v. Baxendale* (1854), 9 Exch. 341.
6. *Burnard v. Haggis* (1863), 14 C.B., N.S. 45.
7. 10 & 11 Geo. V, c. 80, s. 9.
8. *Liability for Consequences*. *Law Quarterly Review*, XXXVIII, 165-6.
9. (1863) 13 C.B., N.S. 430.
10. (1872) L.R. 7, C.P. 253.
11. At this date, it is hardly a breach of confidence to reveal the fact that the interesting *Note on the Treatment of Negligence in this Work*, which appeared in the *Digest of English Civil Law*, Vol. I, p. 545, was from the pen of Professor Geldart, one of the joint authors of the *Digest*.
12. 248 N.Y., 339.
13. *Essays on Jurisprudence and the Common Law*, chap. VII.
14. *Ib.*, pp. 147-150.
15. *Ib.*, p. 137, *ad fin.*

CHAPTER X. MACHINERY OF THE LAW

1. Anderson's Reports, p. 298.
2. 10 Cl. & F. 200.
3. The Rating and Valuation Bill of 1928. For full extracts of the speeches in the House of Lords which led to the withdrawal of the clause, see Lord Hewart's *The New Despotism*, pp. 119-42. As a matter of fact, there was something in the nature of a precedent in the power of His Majesty, under various statutes, to refer matters about which litigation has not yet arisen, to the Judicial Committee of the Privy Council. But the latter body is not purely judicial in character.

No.

4. Berthélemy, *Droit Administratif*, p. 13 ; *Vie juridique des peuples (France)*, p. 348.
5. As to the methods and results of the Continental system of ' official ' judges, see the work of Mr. Ensor, previously alluded to, *Courts and Judges in France, Germany and England*.
6. Where a borough has a Quarter Sessions of its own, the court is held, not by the magistrates, but by a Recorder, a forensic judge, who, however, is not debarred from practice as an advocate before other tribunals.
7. By the Local Government Act of that year.
8. 6 Edw. VII (1906), c. 16, s. 1.
9. London (Routledge), 1932.
10. It is said to have been introduced into the secular jurisdiction by the so-called Star Chamber Act of 1487 (3 Hen. VII, c. 1). But the matter is obscure ; and perjury was not a familiar charge in the secular courts till much later. (See the valuable Note VII in the appendix to the late Mr. Justice Stephen's *Digest of the Criminal Law*.)
11. This was one of the points emphasized by Chief Justice Vaughan in his celebrated judgment in *Bushell's Case* (1670) Vaughan, at p. 147, which put an end to the practice of fining and imprisoning jurors for giving ' perverse ' verdicts.
12. e.g. of 1851 (14 & 15 Vict., c. 99), 1865 (28 & 29 Vict., c. 18), 1869 (32 & 33 Vict., c. 68).
13. Trials for Felony Act (6 & 7 Will. IV, c. 114).
14. On the whole subject of Continental Criminal Procedure, see *History of Continental Criminal Procedure* (mainly by Esmein) in the Continental Legal History Series, Vol. V.
15. See the French procedure briefly described in *La vie juridique des peuples (France)*, pp. 131-4.
16. *Fisher v. Oldham Corporation* [1930] 2 K.B., 364.
17. It would seem that the only case in which by the English Common Law a search warrant may be issued is that of suspected larceny. But there are a good many statutory cases.

CHAPTER XI. CLASSIFICATIONS OF LAW

No.

1. *Jurisprudence*, Vol. I, p. 70.
2. *Op. cit.*, Vol. II, p. 771.
3. The distinction between judicial and administrative functions has recently been well worked out, in another connection, by Mr. D. M. Gordon, in an article entitled *Administrative Tribunals and the Courts*, in *Law Quarterly Review*, Vol. XLIX, pp. 94-120. For a contrary view, see Dean Pound's *Introduction to the Philosophy of Law*, chap. III. While admitting the force of Dean Pound's arguments, the author would venture to suggest that though discretion is, admittedly, an important element in administrative functions, it is not the only feature which differentiates them from judicial functions.
4. *Droit Administratif*, pp. 12-15.
5. The doctrine of 'common employment', which, in England, dates only from the early years of the nineteenth century, exempts an employer from claims by an employee in respect of personal injuries suffered by him in his employer's business through the negligence of a fellow-workman employed in the same employment, unless personal negligence or breach of statutory duty by the employer is proved; in spite of the fact that, if the injury had been suffered by a stranger, the employer would have been liable. The doctrine still exists; but its effects have been greatly modified by the Employers Liability Acts and the Workmen's Compensation Acts.
6. See these provisions admirably summarized by M. Rouast in *La vie juridique des peuples (France)*, pp. 247-71.
7. *The Place of Industrial Law in English Jurisprudence*, *Economica* (London School of Economics and Political Science), No. 13, pp. 28-37.
8. The so-called Statute of Merton (20 Hen. III), c. 9. This was the provision under which the State's Courts claimed the plea of 'special bastardy'.
9. See, for a brief description by M. Capitant, *La vie juridique des peuples (France)*, pp. 181-6.
10. As to this see Schuster, *The Principles of German Civil Law*, pp. 499-508.

No.

11. The distinction is not confined to Western civilization. The Japanese Commercial Code of 1899 is a very remarkable production.
12. The classification of obligations is important ; because it is the key to the unconscious ideal of conduct set up by society for its members. Naturally the standard varies with the type of society ; but it is not a little interesting that such widely separated communities as Roman Italy, Western Europe, and North America should, apparently, have agreed that a person ought to be held legally responsible only if he either (a) inflicts intentional harm, (b) fails to carry out his promises, or (c) causes unintended harm by conduct which, though itself not blameworthy, is attended by risk to his neighbour. For interesting discussions on this topic, see Holmes, *The Common Law*, Lectures I-IV, and Pound, *Introduction*, chap. IV.

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